IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

No. .....

THE CITY OF NORWALK, OHIO,
Defendant-Appellant.

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,
Plaintiff-Appellee.

Appeal from the District Court of the United States, Northern District of Ohio, Western Division

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TRANSCRIPT OF RECORD

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IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CAPTION

United States of America, Northern District of Ohio, Western Division, ss.

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held in the City of Toledo, in said district, on the last Tuesday in April, being the 28th day of said month, in the year of our Lord one thousand nine hundred and thirty-one and of the Independence of the United States of America the one hundred and fifty-fifth, to-wit: on Saturday, the 27th day of June, A. D. 1931.

Present: Honorable George P. Hahn, United States District Judge.

No. 1040. In Equity.

The Equitable Trust Company of New York.

vs.

City of Norwalk, Ohio.

Said action was commenced on the 3rd day of January, A. D. 1930, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

BILL OF COMPLAINT

(Filed Jan. 3, 1930)

Now comes the plaintiff, The Equitable Trust Company of New York, and complaining of defendant, for its cause of action against it, says:

1. The Equitable Trust Company of New York is now, and has been for many years, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in a general banking and trust business, in which business it has been engaged since its incorporation, and is a citizen and resident of the State of New York.

2. Defendant, The City of Norwalk, is and was at all times hereinafter mentioned, a municipal corporation in the State of Ohio, and is the county seat of Huron County, and it is a citizen and resident of the Western Division of the Northern District of said state.

3. This suit is one between citizens of different states. The amount involved, exclusive of interest and costs, exceeds the sum or value of Five Thousand ($5,000.00) Dollars. This suit involves a controversy arising under the Constitution and laws of the United States.

4. The Equitable Trust Company of New York by merger with it in 1929 of The Seaboard National Bank of the City of New York, formerly a banking corporation duly organized and existing under the laws of the United States, duly accomplished by appropriate action of said corporations' respective boards of directors and stockholders, has acquired and succeeded to all of the properties and rights formerly held by said The Seaboard National Bank of the City of New York, and particularly to all those properties and rights formerly acquired and held by said The Seaboard National Bank of the City of New York, under and by virtue of a certain mortgage and deed of trust, dated July 1, 1924, and a supplemental mortgage to said mortgage and deed of trust, dated May 25, 1925, executed and delivered by the Ohio Electric Power Company to said The Seaboard National Bank of the City of New York, as trustee, to secure First Mortgage Gold Bonds of the Ohio Electric Power Company, as hereinafter set forth.

5. The plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is a corporation organized and existing under the laws of Ohio, for the purpose, among others, of furnishing consumers with electric power, light and energy, and

owning, maintaining and operating all equipment necessary therefor, in which business said company is and has been engaged in the City of Norwalk and elsewhere since its incorporation in 1924. Said company, prior to July 1, 1924, in the proper exercise of its powers under the laws of the State of Ohio, and in accordance with resolutions duly passed by its board of directors and its stockholders at respective meetings thereof duly called and held, duly authorized the issue of First Mortgage Gold Bonds in one or more series, maturing at such dates and bearing interest at such rates, respectively, as the board of directors of the company should determine, and as should be approved by the trustee; such bonds to be coupon bonds, registerable or non-registerable as to principal, as the board of directors of the company might determine, and/or registered bonds without coupons, to be executed under the corporate seal of the company, and to be signed in its corporate name by its president or vice-president, impressed with its corporate seal, and attested by its secretary or an assistant secretary, and authenticated by the certificate of the trustee, and the amount of the bonds so to be made, issued, authenticated and delivered to be not limited except that no further bonds should be issued at any time if the total amount of bonds to be outstanding after such issue would in any event exceed the then limit of indebtedness, if any, of the company permitted by law. By the terms of said bonds the Ohio Electric Power Company promised to pay in the case of coupon bonds to the bearer thereof, and in the case of registered bonds, to the registered owner thereof, or his assigns, at the office or agency of the company, the principal sum thereof at the maturity thereof, with interest as specified therein, in gold coin of the United States of America of the standard of weight and fineness, as it then existed, upon the presentation and surrender thereof. The form and tenor of said bonds are set forth specifically in the mortgage and deed of trust above referred to.

6. The Ohio Electric Power Company, on or about July 1, 1924, being thereunto duly authorized by action of its board of directors, and its stockholders, pursuant to the laws of the State of Ohio in such case made and provided, duly executed and delivered to The Seaboard National Bank of the City of New York, as trustee, its certain mortgage and deed of trust, dated July 1, 1924, wherein and whereby in order to secure the payment both of the principal and interest of all such bonds as above stated which might thereafter be issued and out-

standing, and in order to secure the performance and observance of all the covenants and conditions contained in said mortgage and deed of trust, said company granted, bargained, sold, released, conveyed, assigned, transferred, pledged, set over and confirmed to The Seaboard National Bank of the City of New York, as trustee, and to its successor, or successors, in said trust, and to its and their assigns forever, all the various properties of the Ohio Electric Power Company therein described, and by supplemental mortgage, dated May 25, 1925, executed and delivered by said Ohio Electric Power Company granted, bargained, sold, released, conveyed, assigned, pledged, set over and confirmed to said The Seaboard National Bank of the City of New York, as trustee, in like manner and for the same purposes as expressed in said mortgage and deed of trust, all of the properties, franchises and rights of said Ohio Electric Power Company located in the City of Norwalk, County of Huron, and State of Ohio, including especially all of said company's contracts, franchises, grants, rights and privileges which said company then had or might have in the City of Norwalk, or in connection with the conduct of an electric light, heat and power business in said city. Plaintiff as hereinabove stated by merger with it of The Seaboard National Bank of the City of New York duly acquired all the right, title and interest of said The Seaboard National Bank of the City of New York in and to the properties conveyed by said mortgage and deed of trust, and supplemental mortgage thereto, and has duly accepted the trust therein created, and plaintiff then was, and is now fully authorized and empowered to take and hold in trust the property thereby conveyed and to execute the trust imposed on it under and by virtue of the provisions thereof.

Said mortgage and deed of trust and supplemental mortgage thereto were duly filed for record with the recorder of Huron County, Ohio, on the 19th day of June, 1925, at 11:20 o'clock A.M., and were thereafter duly recorded respectively in the Huron County, Ohio, Mortgage Records at Vol. 95, pages 41/74, inclusive, and Vol. 95, pages 75/8, inclusive. And plaintiff is informed and believes, and therefore avers, that it was well known in the City of Norwalk that said mortgage and supplemental mortgage in favor of plaintiff covered all the franchises, rights and privileges, as well as other property of the Ohio Electric Power Company in the City of Norwalk.

7. The Ohio Electric Power Company, after the

execution and delivery of said mortgage and deed of trust, duly made and executed bonds of the initial Series A as therein specified and of other series described and provided for in the mortgage and deed of trust of the aggregate face value of Two Million One Hundred Thousand Dollars ($2,100,000.00), all of which bonds were duly certified by the plaintiff or its predecessor, The Seaboard National Bank of the City of New York, as provided in said mortgage and deed of trust, and all of said bonds were duly issued by the Ohio Electric Power Company in accordance with the provisions of said mortgage, and, as plaintiff is informed and believes, for valuable consideration, and, on information and belief, said bonds are now outstanding in the hands of numerous and various persons and corporations who are the owners and holders thereof for value, and plaintiff is informed and believes, and therefore avers, that all of said bonds so issued are now in all respects valid outstanding obligations of the Ohio Electric Power Company, and are entitled to the benefit and security of said mortgage and deed of trust and said supplemental mortgage thereto.

8. Plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is now, and at and prior to the execution and delivery of said mortgage and deed of trust and supplemental mortgage thereto and the issuance of said bonds was, occupying the streets, alleys and public places in the City of Norwalk with its poles, lines, conduits and other electrical equipment and is and at said times was engaged in the business of furnishing electrical current for lighting, heat and power for domestic and commercial purposes, by virtue of rights under a perpetual franchise so to use the streets, alleys and public places of the City of Norwalk, granted by the State of Ohio, as more particularly hereinafter set forth, and agreed to and concurred in by the City of Norwalk, and under the rights and perpetual franchise so acquired said company has full and complete authority to maintain all such poles, lines, conduits and equipment and to operate the same for the furnishing of electricity, as stated above. Said perpetual franchise and rights are included with all of the tangible property of the Ohio Electric Power Company, conveyed by said company by said mortgage and deed of trust, and supplemental mortgage thereto, to The Seaboard National Bank of the City of New York, to all the title and rights of which this plaintiff succeeded and now holds.

9. Plaintiff is informed and believes, and avers, that the Ohio Electric Power Company acquired and holds its perpetual franchise and rights to maintain and operate its poles, lines, conduits and other electrical equipment in the streets, alleys and public places of the City of Norwalk for the purpose of furnishing electrical current for public, domestic and commercial light, heat and power purposes through and by virtue of various and sundry intermediate conveyances and assignments from its predecessors who were successors of The Incandescent Light & Power Company and of the Northern Electric Company. The Incandescent Light & Power Company was duly incorporated under the laws of the State of Ohio then existing on March 7, 1891, for the purpose of furnishing electric light and power to the citizens of Norwalk and vicinity. The Northern Electric Company was duly incorporated under the laws of the State of Ohio then existing on May 17, 1895, for the purpose of manufacturing and producing electricity for light, heat and power purposes. Said companies by virtue of their respective incorporations acquired from the State of Ohio under the provisions and terms of Sections 3471-A, 3454 and 3461 of the Revised Statutes of Ohio, which were then in full force and effect, perpetual franchises to occupy and use the streets, alleys and public places of the City of Norwalk for the purposes of constructing, maintaining and operating poles, wires, conduits and other electrical equipment therein for the distribution of electric current to the City of Norwalk, and the inhabitants thereof, for public, domestic and commercial light, heat and power purposes, subject only to the right of said municipality to agree with said companies upon the mode of use of its streets, alleys and public places, and in the event of failure to agree, to have said mode of use determined by the Probate Court of Huron County, Ohio.

Plaintiff is further informed and believes, and therefore avers, that said The Incandescent Light & Power Company after its incorporation acquired all of the property and rights of the Norwalk Incandescent Light Company, a partnership, which operated an electric light and power plant and distributing system in Norwalk, Ohio, from about October 7, 1890, until after the incorporation of said The Incandescent Light & Power Company, as hereinafter shown; and thereafter all of said property and rights were transferred by proper conveyance and assignment to the Northern Electric Company. The Northern Electric Company

thereupon, in reliance upon the rights so acquired and upon its grant from the State of Ohio, and the perpetual rights thereby conferred, proceeded during the year 1895 to construct and erect a large and expensive plant in said city for the generation of electricity, sufficient in capacity to provide for all the requirements of said City of Norwalk and its inhabitants for electric current both for public and private purposes, and forthwith during the year 1895, and thereafter, with the approval, consent and agreement of said municipality, proceeded to erect, construct, improve, maintain and use poles, wires, conduits and other equipment on practically all of the public streets, alleys and public places of said city, and further in reliance upon said grant from the State of Ohio and the agreement and consent of said city, operated a modern plant for the generation and distribution of electric current in said city, and furnished electric current to said city and all of the inhabitants thereof, who desired to receive the same under the rules and regulations of such company.

10. Plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is now the owner and holder by purchase and assignment of all of the property, franchises and rights formerly owned by the Northern Electric Company, which property, franchises and rights have been conveyed and assigned from said the Northern Electric Company through its various successors to said Ohio Electric Power Company; and the Ohio Electric Power Company and all of its predecessors in title, including said The Northern Electric Company, have continuously maintained said poles, wires, conduits and electrical equipment, and have continuously operated the same under the franchise rights acquired from the State of Ohio, as above stated, and said company and all of its said predecessors, have at all times since the incorporation of the Northern Electric Company in 1895, continued in the occupancy of the streets, alleys and public places of the City of Norwalk with their said poles, wires, conduits and other equipment, in open reliance upon said franchise rights acquired from the State of Ohio, and with the knowledge, acquiescence, consent and agreement of the said City of Norwalk, both to the continued occupancy of said streets, alleys and public places therein, and to the various transfers, conveyances and assignments of the properties and franchise rights of said The Northern Electric Company to and through its various successors down to and including the Ohio Elec-

tric Power Company. The Ohio Electric Power Company, and its said predecessors at various times following their respective purchases of the properties and franchises of their respective predecessors, in reliance upon the perpetual franchise rights granted by the State of Ohio, and the consent, acquiescence and agreement of said City of Norwalk, have each expended large sums of money in expanding, improving and bettering said plant and distribution system within said city in order to render more efficient service to said city and its inhabitants. The tangible properties and the said perpetual franchise rights of the Ohio Electric Power Company, in the City of Norwalk are each of a value far in excess of Five Thousand ($5,000.00) Dollars. Said perpetual franchise rights acquired from the State of Ohio were granted without any qualification thereof as to duration or assignability, and were in fact perpetual and assignable, and the same now remain in full force and effect as property and contractual rights of the Ohio Electric Power Company, with the State of Ohio, and said franchise rights form an essential and indispensable part of the security afforded by said mortgage and deed of trust and supplemental mortgage thereto, executed and delivered by the Ohio Electric Power Company to this plaintiff's predecessor, The Seaboard National Bank of the City of New York, as trustee, and as plaintiff is informed and believes, and therefore avers, the present holders of the bonds secured by said instruments relied upon said franchise and the security thereof in acquiring and owning said bonds.

11. Plaintiff is informed and believes, and therefore avers, that the defendant, City of Norwalk, by resolution of its city council, passed March 23, 1926, in violation of the perpetual franchise rights of the Ohio Electric Power Company and the rights of this plaintiff and of said bondholders to the security of said franchise rights by reason of said mortgage and deed of trust and supplemental mortgage thereto, asserted that the Ohio Electric Power Company was maintaining and operating its poles, wires, conduits, and other equipment in the various public streets, alleys and public places in said city, without any franchise, license, or authority from said city, and the said city ordered the Ohio Electric Power Company within thirty (30) days to remove and take from all the public streets, alleys and other public places in said City of Norwalk, Ohio, its poles, wires, lines, guy wires, braces, cross-arms, and all other equipment then located in said streets, alleys and other

public places. Said City of Norwalk thereafter made complaint thereof to Edgar G. Martin, as prosecuting attorney of Huron County, Ohio, and thereby requested Edgar G. Martin as such prosecuting attorney to take such legal steps as were provided under the laws of Ohio in quo warranto to oust said Ohio Electric Power Company from the use and enjoyment of said liberty, franchises and privileges.

12. Plaintiff is informed and believes, and therefore avers, that thereafter said Edgar G. Martin in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, Ohio, filed in the Court of Appeals of Huron County, Ohio, a petition in quo warranto against the Ohio Electric Power Company, alleging that said company had taken charge and possession of as of right and was then using the public streets, lanes, avenues and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes, and that said company had assumed and was using said franchise rights and privileges without the consent and authority of the State of Ohio or the City of Norwalk, and prayed that said company be ousted from using the same. Thereafter, such proceedings were had in said suit that said Court of Appeals, on June 7, 1928, entered its judgment and order ousting the Ohio Electric Power Company from further use and occupancy of the public streets, lanes, alleys, avenues and other public places of said City of Norwalk for the erection and maintenance of its poles and other electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes and from exercising any and all said franchise rights and privileges within the City of Norwalk, all from and after the first day of September, 1928; to which decree, judgment and order of ouster, the Ohio Electric Power Company duly excepted; and thereafter said Ohio Electric Power Company duly filed its petition in error in the Supreme Court of Ohio, averring that there was error in said proceedings of said Court of Appeals prejudicial to the plaintiff in error, and praying that said judgment and decree might be reversed and final judgment entered in favor of said the Ohio Electric Power Company; and the Supreme Court of Ohio thereafter on June 12, 1929, entered its judgment

affirming the judgment of said Court of Appeals against the Ohio Electric Power Company.

Plaintiff is informed and believes, and therefore avers, that after the passage of the said resolution or ordinance by the city council of the City of Norwalk on March 23, 1926, an agreement or understanding was arrived at between the representatives of the Ohio Electric Power Company and the officials of said city, wherein it was agreed and understood that, pending a determination of the controversy as to the right of the company to use the streets for its poles, wires and other equipment, the city would not interfere with or molest the company in its use thereof or disturb or remove any of the company's property, and the company, on its part, would not extend its equipment or services or accept business from new customers; but that, in spite of such agreement or understanding, and the adherence and performance thereof by the company, the city did in fact commence by physical force to remove the wires, poles and other equipment of the company from the streets in a manner dangerous to the public safety, while such controversy was still pending; and that the company was obliged to obtain and did obtain a temporary injunction from the courts of the State of Ohio to cause discontinuance of such acts of physical violence on the part of the city, pending the outcome of the quo warranto suit above referred to.

13. Plaintiff is informed and believes, and therefore avers, that the city council of the defendant, the City of Norwalk, on July 30, 1890, passed an ordinance and amended the same on October 7, 1890, by which ordinance and amendment thereto said city purported to grant to The Norwalk Incandescent Light Company, a partnership, its successors and assigns, a franchise and right of way on the streets, alleys and public ways of said city for the purpose of erecting, maintaining and operating thereon an electric light and power distribution system for a period of twenty years.

Plaintiff avers that said ordinance so passed and amended by the council of the defendant, the City of Norwalk, was wholly ineffective and void as a grant of a franchise of said character, but that same in legal effect constituted and was a tender of an agreement by said city as to the mode of use of its streets, alleys and public places to the Norwalk Incandescent Light Company, its successors and assigns, under and in pursuance of statutes of the State of Ohio which were then in full force and effect, and which permitted cities to make

agreements as to the mode of use of streets, alleys and public places by holders of electric light and power franchises. Said tender of agreement as to the mode of use of the streets of said city was accepted by said Norwalk Incandescent Light Company, and by its successors and assigns, including the Ohio Electric Power Company, which has succeeded to and now holds any and all rights of said Norwalk Incandescent Light Company under said ordinance and amendment thereto. Said Norwalk Incandescent Light Company and all of its successors, including the Ohio Electric Power Company, have at all times since continued to comply with and abide by said agreement as to the mode of use of said streets, and said company is now complying with and abiding by it. Plaintiff avers that said City of Norwalk did not at any of the times herein mentioned possess the power to limit the duration of the use of its streets, alleys and public places to a period of twenty years, or any other period under the guise of agreement as to mode of use thereof, but plaintiff further avers that even if said city had the right to limit its agreement as to mode of use to twenty years, which plaintiff does not admit, but expressly denies, said city and the Ohio Electric Power Company and its predecessors, since the expiration of said twenty-year period, have at all times continued to agree upon the said mode of use of the streets, alleys, and public places of said city by said company and its predecessors.

14. Plaintiff avers, on information and belief, that said perpetual franchise rights acquired by The Incandescent Light & Power Company and the Northern Electric Company upon their incorporations in 1891 and 1895, respectively, were subject only to the right of said City of Norwalk to agree with said companies upon the mode of use of the streets, alleys and public ways of said city, and in case they could not agree, then to have the mode of use directed by the Probate Court of Huron County; but this plaintiff further avers that there has never been any disagreement between said City of Norwalk and said companies, and/or any of their successors in title to said franchises, including the Ohio Electric Power Company, as to the mode of use, but that upon the contrary, said City of Norwalk has at all times since the incorporation of The Incandescent Light & Power Company and the Northern Electric Company in 1891 and 1895, respectively, consented, acquiesced and agreed with the said company and its successors, including the Ohio Electric Power Company, as to the mode of use of said streets, alleys and public ways, and that when

the city council of said City of Norwalk in 1926 passed said resolutions of ouster and authorized and directed the institution of quo warranto proceedings against the Ohio Electric Power Company, there was not then any disagreement as to the mode of use of said streets, alleys and public ways, but that said city based its claims and order that the Ohio Electric Power Company should be ousted solely upon the ground that said company was without any right, authority or license to occupy and use said streets, alleys and public places for its electrical distribution system. Plaintiff avers that the occasion has never arisen for the determination of the mode of use by the Probate Court, and that the City of Norwalk has never applied to the Probate Court for a direction as to the mode of use of its streets, alleys and public places by the Ohio Electric Power Company, or any of its predecessors.

15. Plaintiff is informed and believes, and therefore avers, that the electrical generation and distributing plant, poles, lines, wires, conduits, and other equipment of the Ohio Electric Power Company, in and around the City of Norwalk are modern and efficient and all of said system as a going and operating concern has a value of not less than One Hundred and Forty Thousand ($140,000.00) Dollars, and this value is contributed to largely by the fact that numerous individuals, partnerships and corporations in the said City of Norwalk depend upon said Ohio Electric Power Company for the furnishing to them of electric current for light, heat and power. As a going concern said electrical distribution system is a large and substantial portion of the security held by this plaintiff, as trustee, under said mortgage and deed of trust and supplemental mortgage thereto to The Seaboard National Bank of the City of New York to all the rights of which this plaintiff has succeeded and now possesses, and if the Ohio Electric Power Company is compelled to dismantle and remove from the streets, alleys and public places of said city all of its poles, wires, conduits and other equipment for the distribution of electric current, and is prevented from thereafter exercising its perpetual franchise rights in the streets, alleys and public places of said city, its said plant and distribution system will be depreciated in value 90% or more and in fact will have only a junk value, and this plaintiff and the numerous owners and holders for value of the bonds issued by the Ohio Electric Power Company under said mortgage and deed of trust and supplemental mortgage thereto will be deprived and shorn of

a substantial portion of their security, all without having had their day in court.

Said perpetual franchise rights possessed by the Ohio Electric Power Company constitute a contract with the State of Ohio, and said rights are property the protection of which is guaranteed by the Constitution of the United States.

Under said mortgage and deed of trust and supplemental mortgage thereto the Ohio Electric Power Company is charged with the performance of its covenant with the plaintiff to diligently maintain, preserve and renew all rights, powers, privileges and franchises owned by it and necessary for the business of the said company.

16. Plaintiff is informed and believes, and therefore avers, that the defendant, the City of Norwalk, threatens to, and will, unless restrained by this court, proceed summarily in disregard of the rights of this plaintiff to dismantle or cause to be dismantled, and remove or cause to be removed the poles, wires and other equipment of the Ohio Electric Power Company from the streets, alleys and public places of said city, pursuant to the said resolution of ouster passed by the council of said city in 1926, and unless restrained said defendant, the City of Norwalk, will coerce the officers and officials of the Ohio Electric Power Company, to proceed to the dismantling and removal of said poles, wires and other equipment, and will wholly prevent said company from operating its said line and equipment and from continuing to exercise its said franchise rights, to the irreparable injury of this plaintiff and said bondholders for whom the plaintiff is trustee. Neither this plaintiff nor, as plaintiff is informed and believes, any of the bondholders under said mortgage and deed of trust and supplemental mortgage thereto under which this plaintiff acts as trustee for said bondholders, were parties to or were in any way served with process or represented in said quo warranto suit instituted by the State of Ohio on the relation of Edgar G. Martin to oust the Ohio Electric Power Company from the exercise of its perpetual franchise rights in the City of Norwalk, and as to them the passage of said resolution of ouster by the city council of the City of Norwalk in 1926 and the threatened acts of the city in reliance thereon and under said state court decree constitute an impairment of the obligation of the contract of the Ohio Electric Power Company, with the State of Ohio, which contract rights are held by this plaintiff under said mortgage and

deed of trust and supplemental mortgage thereto, and a taking of the property of this plaintiff without due process of law, in violation of the Constitution of the United States, especially Article 1, Section 10, the Fifth Amendment thereto, and Section 1 of the Fourteenth Amendment thereto, and will constitute irreparable damage to this plaintiff, for which it has no adequate remedy at law.

This plaintiff is informed and believes, and therefore avers, that during all the years that the Ohio Electric Power Company and its predecessors in title have held said perpetual franchise rights, and the tangible property used in the exercise of said perpetual franchise rights there has been assessed by the officers and authorities of Ohio and Huron County, Ohio, against said rights and tangible property taxes and assessments of which a portion have been allocated to and received by said City of Norwalk with full knowledge on the part of said city that said taxes and assessments were so assessed and collected, and with complete acquiescence by said city therein and recognition by it that the same were assessed and collected under a claim of right.

By reason of the facts hereinbefore set forth, the defendant, the City of Norwalk, is estopped to assert as against the plaintiff that this plaintiff does not as trustee hold as security for the bonds aforesaid a valid and subsisting perpetual franchise, as aforesaid, of Ohio Electric Power Company, and is estopped to assert that there is now no agreement between said city and said Ohio Electric Power Company as to the mode of use of the streets, alleys and public places of the city by said company under said franchise.

Wherefore, plaintiff prays that a preliminary injunction may issue herein enjoining and restraining the defendant, City of Norwalk, and the officers, officials, agents, employes and representatives of said defendant, from in any manner interfering with or interrupting the continued operation of the plant and electrical distribution system of the Ohio Electric Power Company, in the streets, alleys or other public places of the City of Norwalk, and from taking any steps or doing any act to dismantle, wreck or remove any part of said system from the streets, alleys and public places of said city until such time as all the obligation of said Ohio Electric Power Company to plaintiff and to all bondholders holding bonds issued under said mortgage and deed of trust and supplemental mortgage thereto have been in all respects performed, and that upon final hearing herein

such injunction may be made perpetual; plaintiff further prays that said resolution or ordinance of the City of Norwalk, passed on March 23, 1926, be declared null and void, as an attempt to impair the contractual rights of the plaintiff and to deprive it of its property without due process of law, in violation of the Constitution of the United States; and plaintiff further prays that this honorable court will decree to the plaintiff all such other and further relief, general as well as special, as may be equitable and the nature of its case may require, and to which this plaintiff may be entitled under the laws and Constitution of the United States.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
Robert P. Patterson,
Of Counsel.

State of New York, County of New York, ss:

Samuel Armstrong, first being duly sworn, deposes and says that he is a vice-president of The Equitable Trust Company of New York, a New York corporation, plaintiff in this action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes them to be true.

Samuel Armstrong.

Sworn to before me and subscribed in my presence this 28th day of December, 1929.

Gerard L. McCabe,
Notary Public, Kings County
(Seal) Clerk's No. 214, Register's No. 1125
New York Co. No. 307, Register's No. 1Mc217
Bronx Co. No. 26, Register's No. 3155.
Commission Expires March 30, 1931

No. 25895 Series B

State of New York, County of New York, ss:

I, Thomas M. Farley, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, do hereby certify that said court is a court of record, having by law a seal; that Gerard L. McCabe, whose name is subscribed to the annexed certificate or

proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the clerk's office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at the City of New York, in the County of New York, this 30th day of December, 1929.

Thomas M. Farley,
Clerk.

(Seal)

AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Jan. 8, 1930)

Now comes the plaintiff, The Equitable Trust Company of New York, and by way of amendment and supplement to its bill of complaint filed herein, and further complaining of defendant, for its cause of action against it says:

1. Plaintiff is informed and believes, and therefore avers, that The Ohio Electric Power Company, as set forth in the twelfth paragraph of the bill of com-

plaint filed herein, in cause number 12781, entitled Ohio Electric Power Company, Plaintiff, vs. Northern Ohio Telephone Company, the City of Norwalk et al., Defendants, in the Court of Common Pleas of Huron County, Ohio, on October 26th, 1927, secured a temporary injunction against the defendant, City of Norwalk, and certain of its officials and employees, enjoining said city, its said officials and employees, from removing, interfering with and destroying the poles and overhead construction, light and power lines of The Ohio Electric Power Company in and upon and along the streets, public places and ways in the City of Norwalk, Ohio, and especially upon and along West Main Street and North and South Linwood Avenues in said city.

2. Plaintiff is informed and believes, and therefore avers, that early in the morning of said date of October 26, 1927, on which said temporary injunction was secured, the defendant, City of Norwalk, did in fact by physical force begin to remove the poles, wires and other equipment of The Ohio Electric Power Company from West Main Street in the vicinity of its intersection with Linwood Avenue, in the City of Norwalk, and succeeded in so removing a large number of said poles, wires and much other equipment, and that said temporary injunction in the Common Pleas Court of Huron County was secured by The Ohio Electric Power Company in order to restrain the city from such wrongful removal of the company's poles, wires and other equipment.

Plaintiff is informed and believes, and therefore avers, that on January 3rd, 1930, the defendant, City of Norwalk, asserted and threatened that it would not grant or extend to The Ohio Electric Power Company any favors, privileges or quarter of any kind, and that said city would act as promptly as possible and would put The Ohio Electric Power Company out of said city as quickly as it could. Plaintiff is informed and believes, and therefore avers, that in making such assertion and threat the defendant city meant and had in mind, and does intend, to apply to the Court of Common Pleas of Huron County, Ohio, for the dissolution of said temporary injunction granted by said court in favor of The Ohio Electric Power Company against said city on October 26th, 1927, and that said Court of Common Pleas of Huron County is bound to follow the decisions of the Courts of Appeals and of the Supreme Court of the State of Ohio, and by reason of the judgment of ouster rendered by the Court of Appeals for

Huron County, Ohio, against The Ohio Electric Power Company in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, and the affirmance of said judgment by the Supreme Court of Ohio, the Common Pleas Court of Huron County, Ohio, will upon such application dissolve said temporary injunction. Plaintiff is informed and believes, and therefore avers, that defendant, City of Norwalk, further had in mind by said assertion and threat, that it would put The Ohio Electric Power Company out of the city as quickly as possible, and intends upon the dissolution of said temporary injunction in the Common Pleas Court of Huron County, Ohio, to proceed, and unless restrained by this court, will proceed to the forcible removal of the poles, wires and other equipment of The Ohio Electric Power Company in the streets, alleys and public places of said city.

3. Plaintiff is informed and believes, and therefore avers, that the defendant, City of Norwalk, during the past year, or more, has followed a systematic policy of removing meters of The Ohio Electric Power Company from houses and buildings formerly occupied by customers of The Ohio Electric Power Company on the vacation of said houses and buildings by said customers, and the installation in place thereof of meters of the municipal electric light and power company operated by the City of Norwalk, without obtaining the consent thereto of anyone.

Wherefore, plaintiff prays that a temporary restraining order may issue herein enjoining and restraining the defendant, City of Norwalk, and the attorneys, officers, officials, agents, employees and representatives of said defendant in terms and effect as prayed for in plaintiff's bill of complaint, and further enjoining and restraining the defendant, City of Norwalk, and the attorneys, officers, officials, agents, employees and representatives of said defendant from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio, of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, against the Ohio Electric Power Company, which judgment was affirmed by the Supreme Court of Ohio, and from apply-

ing to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster. Plaintiff further prays that a preliminary injunction may issue containing in effect such temporary restraining order, and that upon final hearing herein such injunction may be made perpetual.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
Robert P. Patterson,
Of Counsel.

State of Ohio, Lucas County, ss.

Earl F. Boxell, first being duly sworn, deposes and says that he is one of the solicitors of the Equitable Trust Company of New York, plaintiff in the above entitled action; that he has read the foregoing amendment and supplement to bill of complaint; that the allegations thereof are made with reference to information gained by him on January 3rd, 1930, and therefore he makes this verification; that the allegations of said amendment and supplement to bill of complaint are true except as to matters stated to be upon information and belief, and as to those matters he believes them to be true.

Earl F. Boxell.

Sworn to before me and subscribed in my presence this 8th day of January, 1930.

Helen M. Johnston,
(Seal) Notary Public, Lucas County, Ohio.
My commission expires Sept. 15, 1931.

AFFIDAVIT
(Filed Jan. 8, 1930)

State of Ohio, Lucas County, ss.

Earl F. Boxell, first being duly sworn, deposes and says that he is of counsel for the plaintiff in the above entitled action by The Equitable Trust Company of New York, Plaintiff, vs. City of Norwalk, Defendant; that on January 3rd, 1930, he called upon Mr. G. Ray Craig, in Mr. Craig's office at Norwalk, Ohio; that G. Ray Craig is and has been of counsel for the plaintiff in the quo warranto action instituted in the name of the State of Ohio, on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, against the Ohio Electric Power Company in the Court of Appeals of Huron County, Ohio, in which a judgment of ouster was entered against the Ohio Electric Power Company, which judgment was affirmed by the Supreme Court of Ohio; that upon said occasion affiant informed Mr. Craig as one of the attorneys for the defendant, City of Norwalk, that the bill of complaint in the above entitled action had been filed in the morning of January 3rd, 1930; that affiant called to the attention of Mr. Craig the fact that there was still in effect the temporary injunction which was granted in favor of the Ohio Electric Power Company by the Common Pleas Court of Huron County, Ohio, in Cause No. 12781 upon its docket, entitled Ohio Electric Power Company, Plaintiff, vs. Northern Ohio Telephone Company, the City of Norwalk et al., Defendants, by which the City of Norwalk and certain of its officials and employees were enjoined from removing, interfering with and destroying the poles and overhead construction, light and power lines of the Ohio Electric Power Company in and upon and along the streets, public places and ways in the City of Norwalk, Ohio, and especially along and upon West Main Street and North and South Linwood Avenues in said city; that affiant remarked to Mr. Craig that while the Common Pleas Court of Huron County, Ohio, would in all probability feel bound upon an application therefor by the City of Norwalk to dissolve said temporary injunction by reason of the decision of the Court of Appeals of Huron County, Ohio, in said quo warranto action and the decision of the Ohio State Supreme Court affirming said judgment of ouster, that it was affiant's belief that this court would not permit the poles, lines and electrical distribution equipment of the Ohio Electric Power Company in the City of Norwalk to be removed

and torn out by said city pending the final determination of this cause, in view of which it would be advisable and for the best interests of the parties to the within action to come to an agreement whereby no action would be taken by the City of Norwalk for the dissolution of said temporary injunction in the Common Pleas Court of Huron County, Ohio, pending the final determination of the issues in the within suit, and thereby eliminate the necessity for an application and hearing upon the same for a preliminary injunction herein, and thus make it possible to have all the issues herein determined in one hearing, namely, final hearing to be had at a date as early as possible; that thereupon Mr. Craig asserted vigorously that the City of Norwalk would not agree to anything, that said city would extend no privileges, favors, or quarter whatever to the Ohio Electric Power Company, and that said City of Norwalk would put the Ohio Electric Power Company and its poles, lines and equipment out of said city as quickly as possible.

Further affiant saith not.

Earl F. Boxell.

Sworn to before me and subscribed in my presence this 8th day of January, 1930.

Helen M. Johnston,

(Seal) Notary Public, Lucas County, Ohio.

My commission expires Sept. 15, 1931.

TEMPORARY RESTRAINING ORDER

(Filed Jan. 8, 1930)

This day this cause came on to be heard upon the application of the plaintiff, The Equitable Trust Company of New York, for a temporary restraining order, and the plaintiff offered in support of said application its verified bill of complaint, the verified amendment and supplement to its bill of complaint, and the affidavit filed with said amendment and supplement to the bill of complaint.

The court upon consideration of the averments of said bill of complaint and the amendment and supplement thereto and of said affidavit, finds that at this time a temporary restraining order should be issued herein, notice having been given to the defendant, for the reason that it clearly appears from specific facts shown by the verified bill of complaint and the amendment and supplement thereto and by said affidavit that immediate and irreparable loss or damage will likely result to plaintiff before the matter can be heard upon a motion for preliminary injunction and notice thereof, and that among such specific facts so shown are that plaintiff is trustee for numerous holders of bonds issued by the Ohio Electric Power Company under the provisions of a mortgage and deed of trust dated July 1, 1924, and a supplemental mortgage thereto dated May 25, 1925, executed and delivered by the Ohio Electric Power Company to the Seaboard National Bank of the City of New York, covering all of the properties, rights and franchises of the Ohio Electric Power Company in the City of Norwalk, Ohio; that The Equitable Trust Company of New York has succeeded to all the rights and duties of the Seaboard National Bank of the City of New York under said mortgage and deed of trust and supplemental mortgage thereto; that as shown by said bill of complaint and the amendment and supplement thereto, said defendant, City of Norwalk, has threatened to proceed summarily and in disregard of the rights of the plaintiff and the holders of said bonds, to dismantle and remove the poles, wires and other equipment of the Ohio Electric Power Company from the streets, alleys, and public places of said city, and to prevent said company from operating its lines and equipment and from exercising its perpetual franchise rights in said city, and action has been taken and attempts have been made by said city and its officials and employees to accomplish said results, and said city, its officials and employees have actually

removed part of the poles, lines and equipment of said company, all in violation of the rights of the plaintiff; and that as shown by said bill of complaint and amendment and supplement thereto and affidavit, there is imminent danger of great injury and damage to the property rights of plaintiff. And the court finds that it is necessary to direct that the defendant herein, its attorneys, officers, officials, agents, employees and representatives, be restrained from and after the day and hour of the issuance of this order, as hereinafter set forth.

It is therefore ordered, adjudged and decreed that during the continuance of this temporary restraining order the defendant herein, its attorneys, officers, officials, agents, employees and representatives, and those in active concert or participating with them and all persons whomsoever to whom notice of this order shall come, be and they are severally and collectively hereby enjoined and restrained as follows:

From in any manner inteffering with or interrupting the continued operation of the plant and electrical distribution system of the Ohio Electric Power Company in the streets, alleys or other public places of the City of Norwalk, Ohio, and from taking any steps or doing any act to dismantle, wreck, or remove any part of said system from the streets, alleys and public places of said city until such time as all the obligations of said Ohio Electric Power Company to plaintiff and to all bondholders holding the bonds issued under the mortgage and deed of trust dated July 1, 1924, and the supplemental mortgage thereto, dated May 25, 1925, both of which instruments were executed and delivered by the Ohio Electric Power Company to the Seaboard National Bank of the City of New York, to all the rights and duties of which under said mortgage and deed of trust and supplemental mortgage thereto plaintiff, The Equitable Trust Company of New York, has succeeded, have been in all respects performed.

From taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio, of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, against the Ohio Electric Power Company, which judgment was affirmed by the Supreme Court of Ohio, and from applying to

any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.

This temporary restraining order shall be effective as of Wednesday, January 8th, 1930, at ten o'clock A.M., and shall continue in force until further order of this court, but not beyond ten o'clock A.M. of Saturday, January 18th, 1930.

Plaintiff's application for a temporary injunction is hereby set for hearing at the court room of this court at Toledo, Ohio, at ten o'clock A.M. on January 15, 1930, and the service of this order on the defendant shall constitute notice of the said hearing to the defendant. At said time the court will consider the advisability and propriety of entering herein an order of preliminary injunction on the lines of this order, or as the same may be then or theretofore modified. The court reserves the right to modify this order at any time upon its own motion and without hearing, if the court shall deem it necessary so to do to make this order more effective to bring about the purpose for which the same is now issued, and the right is granted to the complainant to ask at any time prior to the expiration of this order that there be added hereto such provisions as plaintiff may deem necessary.

The marshal for the Northern District of Ohio is directed to make service of this order upon the defendant and to see that this order is enforced, and to arrest or cause to be arrested any person or persons caught in the act of disobeying any of the provisions of this order and bring such person or persons forthwith before the court, and to report to the court such other acts of the disobedience of this order as may come to his attention. The marshal is ordered and directed to call to his assistance such persons, either as deputy marshals, or otherwise, as he may deem necessary, and is authorized by law to do, for the purpose of securing complete obedience to the provisions hereof.

This order shall not be effective until the plaintiff shall have given bond, conditioned according to law, in the sum of Five Hundred ($500.00) Dollars.

Geo. P. Hahn, Judge.

BOND

(Filed Jan. 8, 1930)

Know All Men by These Presents, that The Equitable Trust Company of New York, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto the City of Norwalk, Ohio, the defendant named in Cause No. 1040, In Equity, pending in the District Court of the United States for the Northern District of Ohio, Western Division, in the sum of Five Hundred ($500.00) Dollars, to the payment of which they bind themselves, their successors and assigns, firmly by these presents.

The condition of the above obligation is such that whereas The Equitable Trust Company of New York having filed on the chancery side of the District Court of the United States for the Northern District of Ohio, Western Division, a bill of complaint and amendment and supplement to said bill of complaint against the said City of Norwalk, Ohio, and having obtained the allowance of a temporary restraining order as prayed for in said bill of complaint and the amendment and supplement thereto from the Honorable George P. Hahn, judge of said court, now if the said The Equitable Trust Company, of New York, shall abide by the decisions of said court and pay such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by said temporary restraining order, then these presents shall be void, otherwise to remain in full force.

Signed, sealed and delivered this 8th day of January, 1930.

The Equitable Trust Company of New York,
By Tracy, Chapman & Welles, Its Attorneys.
The Fidelity & Deposit Company of Maryland,
By Wm. B. Welles,
Surefy. (Seal)

Signed and sealed in the presence of:
Charles Weirich
A. M. Stiller

Approved:
Geo. P. Hahn, District Judge.
January 8, 1930.

ORDER CONTINUING INJUNCTION
(Filed Jan. 18, 1930)

On Wednesday, January 15th, 1930, this cause came on to be heard upon plaintiff's motion for a preliminary injunction and plaintiff offered to proceed forthwith with the hearing thereon, and the defendant having at that time filed its motion for an order to quash the writ of subpoena issued herein and to vacate and set aside the return of service thereon, which motion was taken under advisement, and defendant not being ready to proceed upon the plaintiff's motion for a preliminary injunction, the hearing on said motion was postponed, and the court finding it necessary to extend and keep in force the temporary restraining order heretofore granted herein on January 8th, 1930, for the reasons stated therein, for ten (10) days from January 18th, 1930, at ten o'clock A.M. until January 28th, 1930, at ten o'clock A.M.

It is, therefore, with defendant's consent, hereby ordered that the temporary restraining order heretofore granted herein on January 8th, 1930, be, and the same hereby is extended and continued in full force and effect for ten (10) days from January 18th, 1930, at ten o'clock A.M., until January 28th, 1930, at 10 o'clock A.M., without prejudice to such rights as the defendant may have under its motion to quash the writ of subpoena and to vacate and set aside the service thereof upon the defendant.

Geo. P. Hahn, Judge.

9:57 A.M., 18 January, 1930.

ORDER CONTINUING INJUNCTION
(Filed Jan. 28, 1930)

On Tuesday, January 28th, 1930, came the plaintiff and the defendant herein by their respective counsel and agreed by mutual consent that the temporary restraining order heretofore granted herein on January 8th, 1930, might be further extended and kept in full force and effect until such time as this cause can be submitted and decided upon final hearing, subject to such rights as the defendant may have under its motion to quash the writ of subpoena and to vacate and set aside the service thereof upon the defendant, and the court finding it necessary to further so extend and keep in force the temporary restraining order heretofore granted herein on January 8th, 1930, for the reasons stated therein, and to prevent irreparable damage to the plaintiff.

It is, therefore, by mutual agreement of the plaintiff and the defendant, hereby ordered that the temporary restraining order heretofore granted herein on January 8th, 1930, be, and the same hereby is further extended and continued in full force and effect from January 28th, 1930, at ten o'clock A.M. until this cause can be submitted and decided upon final hearing, without prejudice to such rights as the defendant may have under its motion to quash the writ of subpoena and to vacate and set aside the service thereof upon the defendant.

Geo. P. Hahn, Judge.

January 28, 1930.

Approved:

Tracy, Chapman & Welles of
Solicitors for Plaintiff.

G. Ray Craig of
Solicitors for Defendant.

MOTION

(Filed Aug. 5, 1930)

Now comes The Chase National Bank of the City of New York, and says that it is now and has been for many years a corporation duly organized and existing under and by virtue of the laws of the United States for the purpose of engaging in a general banking and trust business, in which business it has engaged since its incorporation; that it is a citizen and resident of the State of New York; that The Chase National Bank of the City of New York by merger with it on May 31, 1930, of The Equitable Trust Company of New York, the plaintiff herein, duly accomplished by appropriate action of said corporations' respective boards of directors and stockholders, has acquired and succeeded to all of the properties and rights formerly held by said The Equitable Trust Company of New York, and particularly to all those properties and rights set forth and asserted by The Equitable Trust Company of New York in the bill of complaint and the amendment and supplement to the bill of complaint filed herein, and that it is fully authorized to take and hold in trust the property formerly held by The Equitable Trust Company of New York under the mortgage and deed of trust and supplemental mortgage thereto deseribed in the bill of complaint herein, and to execute the trust imposed upon it by the provisions of said instruments, and that it now holds and is engaged in carrying out said trust.

The Chase National Bank of the City of New York, therefore, moves the court for an order reviving this action in its name as plaintiff against the City of Norwalk, Ohio, and that The Chase National Bank of the City of New York be substituted as plaintiff herein in place of The Equitable Trust Company of New York, with all of the rights and benefit of all orders and proceedings heretofore taken herein by or on behalf of The Equitable Trust Company of New York, and that this cause stand in the same condition with respect to the parties upon such substitution as it was in with respect to the original parties at the time of said merger.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
T. N. Pfeiffer,
Of Counsel.

State of New York, County of New York, ss.

G. A. Kinney, being first duly sworn, deposes and says that he is a vice-president of The Chase National Bank of the City of New York; that he has read the foregoing motion and knows the contents thereof, and that the same is true.

G. A. Kinney.

Sworn to before me and subscribed in my presence this 8th day of July, 1930.

Walter S. Nelson,
Notary Public, New York County, N. Y.
Notary Public, Kings County,
(Seal) Clerk's No. 51, Register's No. 2059
New York Co. No. 148, Register's No. 2N109
Queens Co. No. 374, Register's No. 2376
Commission Expires March 30, 1932

ORDER

(Filed Aug. 5, 1930)

This day this cause came on for hearing upon the motion of The Chase National Bank of the City of New York for an order reviving this action in its name and substituting it as plaintiff in place of The Equitable Trust Company of New York, and it appearing to the court from the verified statements contained in said motion that said The Chase National Bank of the City of New York by merger with it of The Equitable Trust Company of New York on May 31, 1930, has acquired and succeeded to all of the properties and rights then held by The Equitable Trust Company of New York, including whatever title said The Equitable Trust Company of New York then had to the property and rights asserted by it in the bill of complaint and amendment and supplement thereto herein, and that the City of

Norwalk has consented to the revivor of this action against it and the substitution of The Chase National Bank of the City of New York as plaintiff in place of The Equitable Trust Company of New York with the consent of both parties.

It is hereby ordered that said The Chase National Bank of the City of New York be, and it is hereby substituted in place of The Equitable Trust Company of New York as party plaintiff in this action, with all the rights and benefit of all orders and proceedings heretofore taken herein by or on behalf of The Equitable Trust Company of New York, and that this action stand revived in the same condition with respect to the parties herein upon such substitution as it was in with respect to the original parties at the time of said merger, and shall proceed in the name of the said The Chase National Bank of the City of New York as plaintiff against the City of Norwalk, Ohio, as defendant.

Geo. P. Hahn, Judge.

SECOND AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Aug. 5, 1930)

Now comes The Chase National Bank of the City of New York, having been substituted as plaintiff herein for and having succeeded to the rights and benefit of all orders and proceedings taken herein by and for The Equitable Trust Company of New York, pursuant to the orders of this court by way of a second amendment and supplement to the bill of complaint filed herein, and further complaining of defendant for its cause of action against it says:

1. The Chase National Bank of the City of New York is now and has been for many years a corporation duly organized and existing under and by virtue of the laws of the United States for the purpose of engaging

in a general banking and trust business, in which business it has been engaged since its incorporation, and is a citizen and resident of the State of New York.

The Chase National Bank of the City of New York by merger with it on May 31, 1930, of The Equitable Trust Company of New York, formerly a banking corporation, duly organized and existing under the laws of the State of New York, and the original plaintiff herein, duly accomplished by appropriate action of said corporations' respective boards of directors and stockholders, has acquired and succeeded to all of the properties and rights formerly held by said The Equitable Trust Company of New York, and particularly to all those properties and rights set forth and asserted by The Equitable Trust Company of New York in the bill of complaint and the amendment and supplement to bill of complaint filed by it herein.

The Chase National Bank of the City of New York is fully authorized to take and hold in trust the property formerly held by The Equitable Trust Company of New York under the mortgage and deed of trust and supplemental mortgage thereto described in the bill of complaint herein, and to execute the trust imposed upon it by the provisions of said instruments, and adopts all things done and proceedings heretofore taken herein by and on behalf of The Equitable Trust Company of New York.

2. Plaintiff hereby amends Section 5 of the bill of complaint herein so as to make said Section 5 read as follows:

> "Plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is a corporation organized and existing under the laws of the State of Ohio for the purpose, among others, of furnishing customers with electric power, light and energy, and owning, maintaining, and operating all equipment necessary therefor, in which business said company is and has been engaged in the City of Norwalk and elsewhere since its incorporation on August 12, 1924. Said company on August 28, 1924, in the proper exercise of its powers under the laws of the State of Ohio, and in accordance with resolutions duly passed by its board of directors and its stockholders at respective meetings thereof duly called and held, duly authorized the issue of First Mortgage Gold Bonds in one or more series, maturing at such dates and bearing interest at such rates,

respectively, as the board of directors of the company should determine, and as should be approved by the trustee; such bonds to be coupon bonds, registerable or non-registerable as to principal, as the board of directors of the company might determine, and/or registered bonds without coupons, to be executed under the corporate seal of the company, and to be signed in its corporate name by its president or vice-president, impressed with its corporate seal, and attested by its secretary or an assistant secretary, and authenticated by the certificate of the trustee, and the amount of the bonds so to be made, issued, authenticated and delivered to be not limited except that no further bonds should be issued at any time if the total amount of bonds to be outstanding after such issue would in any event exceed the then limit of indebtedness, if any, of the company permitted by law. By the terms of said bonds the Ohio Electric Power Company promised to pay in the case of coupon bonds to the bearer thereof, and in the case of registered bonds, to the registered owner thereof, or his assigns, at the office or agency of the company, the principal sum thereof at the maturity thereof, with interest as specified therein, in gold coin of the United States of America of the standard of weight and fineness, as it then existed, upon the presentation and surrender thereof. The form and tenor of said bonds are set forth specifically in the mortgage and deed of trust above referred to."

3. Plaintiff hereby amends Section 6 of the bill of complaint herein so as to make said section read as follows:

"The Ohio Electric Power Company, on or about September 2, 1924, being thereunto duly authorized by action of its board of directors, and its stockholders, pursuant to the laws of the State of Ohio in such case made and provided, duly executed and delivered to The Seaboard National Bank of the City of New York, as trustee, its certain mortgage and deed of trust, dated July 1, 1924, wherein and whereby in order to secure the payment both of the principal and interest of all such bonds as above stated which might thereafter be issued and outstanding, and in order to secure the performance and observance of all the

covenants and conditions contained in said mortgage and deed of trust, said company granted, bargained, sold, released, conveyed, assigned, transferred, pledged, set over and confirmed to The Seaboard National Bank of the City of New York, as trustee, and to its successor, or successors, in said trust, and to its and their assigns forever, all the various properties of the Ohio Electric Power Company therein described, and by supplemental mortgage, dated May 25, 1925, executed and delivered on or about May 29, 1925, by said Ohio Electric Power Company granted, bargained, sold, released, conveyed, assigned, pledged, set over and confirmed to said The Seaboard National Bank of the City of New York, as trustee, in like manner and for the same purposes as expressed in said mortgage and deed of trust, all of the properties, franchises and rights of said Ohio Electric Power Company located in the City of Norwalk, County of Huron, and State of Ohio, including especially all of said company's contracts, franchises, grants, rights and privileges which said company then had or might have in the City of Norwalk, or in connection with the conduct of an electric light, heat and power business in said city. Plaintiff as hereinabove stated by merger with it of The Seaboard National Bank of the City of New York duly acquired all the right, title and interest of said The Seaboard National Bank of the City of New York in and to the properties conveyed by said mortgage and deed of trust, and supplemental mortgage thereto, and has duly accepted the trust therein created, and plaintiff then was and is now fully authorized and empowered to take and hold in trust the property thereby conveyed and to execute the trust imposed on it under and by virtue of the provisions thereof.

Said mortgage and deed of trust and supplemental mortgage thereto were duly filed for record with the recorder of Huron County, Ohio, on 19th day of June, 1925, at 11 o'clock A.M., and were thereafter duly recorded respectively in the Huron County, Ohio, Mortgage Records at Vol. 95, pages 41/74, incl., and Vol. 95, pages 75/8, incl. And plaintiff is informed and believes and therefore avers, that it was well known to the City of Norwalk that said mortgage and supplemental mortgage in favor of plaintiff covered all the fran-

chises, rights and privileges, as well as other property of the Ohio Electric Power Company in the City of Norwalk."

4. Plaintiff hereby amends Section 13 of the bill of complaint so as to make the first paragraph of said Section 13 read as follows:

"Plaintiff is informed and believes, and therefore avers, that the city council of the defendant, the City of Norwalk, on July 30, 1890, passed an ordinance and amended the same on October 7, 1890, by which ordinance and amendment thereto said city purported to grant to The Norwalk Incandescent Light Company, a partnership, its successors and assigns, a franchise and right of way on the streets, alleys and public ways of said city for the purpose of erecting, maintaining and operating thereon an electric light and power distribution system for a period of twenty years. True copies of said ordinances of the City of Norwalk passed on July 30, 1890, and October 7, 1890, respectively, are hereto attached, marked Exhibits A and B, respectively, and are made a part hereof."

5. Plaintiff hereby amends Section 16 of the bill of complaint herein by striking therefrom the words:

"the fifth amendment thereto."

Wherefore, plaintiff prays as in its bill of complaint and the amendment and supplement thereto.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
T. N. Pfeiffer,
Of Counsel.

State of New York, New York County, ss.

G. A. Kinney, first being duly sworn, deposes and says that he is a vice-president of The Chase National Bank of the City of New York, a corporation organized and existing under the laws of the United States, plaintiff in this action; that he has read the foregoing second amendment and supplement to bill of complaint and knows the contents thereof, and that the same is true ex-

cept as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

G. A. Kinney.

Sworn to before me and subscribed in my presence this 8th day of July, 1930.

Walter S. Nelson,
Notary Public, New York County, New York
(Seal) Notary Public, Kings County
Clerk's No. 51, Register's No. 2059
New York Co. No. 148, Register's No. 2N109
Queens Co. No. 374, Register's No. 2376
Commission Expires March 30, 1932

EXHIBIT A

"ORDINANCE OF THE CITY OF NORWALK, OHIO,
Passed July 30, 1890

AN ORDINANCE

To grant certain privileges as therein set forth to the Incandescent Light Company of Norwalk, Ohio.

Sec. 1. Be it ordained by the City Council of Norwalk, Ohio, that the Norwalk Incandescent Light Company of Norwalk, Ohio, its successors and assigns are hereby granted for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks, alleys and public grounds of the said City for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use the Heisler system of Incandescent lighting in said City. Provided that the said Company its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said posts or poles and wires on Main street in said City shall be at least twenty feet high and of the usual height other whereas, and be so placed as not to interfere with the travel upon such streets or other places, or so as not to interfere with any ornamental or shade trees without the consent of the owner or owners thereof or of the City Commissioners, and provide further that all those parts of such streets or other public places used in erecting said poles or wires shall be

erected and maintained in good order by the said company its successors and assigns and provided that said posts and wires shall be placed so as not to interfere with the flow of water in any drain or gutter of said city. The points for the location of such poles shall be determined under the direction of the Street Committee of said Council. This grant of way is not exclusive and the said Council reserves the power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such right shall not be used so as to interfere with any rights hereby granted.

Passed July 30, 1890.

Wm. Himberger, Pres. of Council.

Attest: John W. Rexford, City Clerk."

EXHIBIT B

"ORDINANCE OF THE CITY OF NORWALK, OHIO,
Passed Oct. 7, 1890

AN ORDINANCE

An Ordinance to Amend an Ordinance Entitled, An Ordinance to Grant Certain Privileges as Therein Set Forth to the Incandescent Lighting Company of Norwalk, Ohio, Passed July 30th, 1890.

Section 1. Be it ordained by the City Council of Norwalk, Ohio, that the ordinance entitled an ordinance to grant certain privileges as therein set forth to the Incandescent Light Company, of Norwalk, Ohio, passed July 30th, 1890, be and hereby is amended as follows:

Section 1. That the Norwalk Incandescent Light Company, of Norwalk, Ohio, its successors and assigns are hereby granted, for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks, alleys and public grounds of said city for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable matetrial, and the necessary wires successfully to operate and use a system of incandescent lighting in said City—Provided that the said company its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said posts or poles and wires on Main street in said city shall be at least twenty feet high, and of the usual height otherwise

and be so placed as not to interfere with the travel upon such streets or other places nor with any ornamental or shade trees without the consent of the owners thereof or of the city Commissioner and provided further that all those parts of such streets or other public places in erecting said poles or wires, shall be kept and maintained in good order by said Company its successors and assigns, and provided further that said posts and wires shall be so placed as not to interfere with the flow of water in any drain or gutter of said city. The points for the location of such poles or posts shall be determined under the direction of the Street Commissioner of said Council. This grant of way is not exclusive and the said Council reserves the power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such right shall not be used so as to interfere with any rights hereby granted.

Section 2. That said original ordinance be and same is hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Passed Oct. 7th, 1890.

Jno. A. Rynn, Pres. Pro Tem Council.
Attest: John W. Rexford, City Clerk."

ANSWER
(Filed Sept. 15, 1930)

The defendant, for its answer to the Bill of Complaint, Amendment and Supplement to the Bill of Complaint, and Second Amendment and Supplement to the Bill of Complaint, herein says:

1. It admits that The Chase National Bank of the City of New York is a corporation organized and existing under and by virtue of the laws of the United States for the purpose of engaging in a general banking and

trust business and is a citizen and resident of the State of New York. It further admits that The Equitable Trust Company of New York was, at the time of the filing of the Bill of Complaint herein, a corporation organized and existing under the laws of the State of New York for the purpose of engaging in a general banking and trust business.

Being without information on the subject, defendant denies that The Chase National Bank of the City of New York, by merger with it, on May 31, 1930, of The Equitable Trust Company of New York, the original plaintiff herein, has acquired and succeeded to all of the rights and properties so held by The Equitable Trust Company of New York and particularly to all those properties and rights set forth and asserted by The Equitable Trust Company of New York in the Bill of Complaint and the Amendment and Supplement thereto filed by it herein.

2. Defendant admits that it is, and was, at all times mentioned in the Bill of Complaint, and in this Answer, a municipal corporation in the State of Ohio, and that it is the county-seat of Huron County, and that it is a citizen and resident of the Western Division of the Northern District of the State of Ohio. Defendant further says that it became a municipal corporation in the State of Ohio on or before April 9, 1859 and became a city on or before April 4, 1881.

3. The defendant admits that this is a suit between citizens of different states. Defendant denies that the amount involved, exclusive of interest and costs, exceeds the sum and value of $5,000. Defendant further denies that this suit involves a controversy arising under the Constitution and laws of the United States.

4. Being without information upon the subject, the defendant denies all of the allegations of Section 4 of the Bill of Complaint.

5. Defendant admits that The Ohio Electric Power Company is an Ohio corporation organized to furnish consumers with electric power, light and energy and owning and maintaining and operating all equipment necessary therefor, but denies said company has been engaged in such business of furnishing consumers with electric power, light and energy in the City of Norwalk and elsewhere since its incorporation in 1924 and says that said company did not enter into such business in the City of Norwalk until on or about May 22, 1925.

Being without information on the subject, defendant denies all of the other allegations of Section 5 of the

Bill of Complaint, as amended by the said Amendment and Supplement to the Bill of Complaint.

6. Being without information upon the subject, defendant denies all of the allegations of Section 6 of the Bill of Complaint as amended by Section 3 of the Second Amendment and Supplement to the Bill of Complaint, except that two instruments, one purporting to be a mortgage and deed of trust, and another purporting to be a supplemental mortgage, of The Ohio Electric Power Company to The Seaboard National Bank of the City of New York, were filed for record with the Recorder of Huron County, Ohio, on or about the 19th day of June, 1925, and were thereafter duly recorded, respectively, in the Huron County, Ohio, Mortgage Records, Volume 95, pages 41 to 74, inclusive, and Volume 95, pages 75 to 78, inclusive. Defendant denies that it was known to the City of Norwalk that said mortgage and supplemental mortgage were in existence prior to the filing of the Bill of Complaint herein and further says that The Ohio Electric Power Company had no franchise, rights or privileges in the City of Norwalk before or after the execution of such mortgages and that, therefore, no such franchise, rights or privileges could be conveyed to The Seaboard National Bank in the City of New York.

7. Being without information upon the subject, defendant denies all of the allegations of Section 7 of the Bill of Complaint.

8. Defendant denies that The Ohio Electric Power Company was occupying the streets, alleys, and public places with its poles, lines, conduits and other electrical equipment, or was engaged in the business of furnishing electric current for light, heat, and power for domestic and commercial purposes, prior to the alleged execution and delivery of the mortgage and deed of trust referred to in the Bill of Complaint, but admits that, prior to the alleged execution of the supplemental mortgage, said company was occupying such streets, alleys, and public places with such equipment and engaged in the business of furnishing electric current for light, heat, and power for domestic and commercial purposes. Defendant denies that such occupancy was by virtue of any right or claim of right under any perpetual franchise or was agreed to and concurred in by the defendant and denies that said company now has, or ever had, any authority to maintain such poles, lines, conduits, and equipment and to operate the same.

9. Defendant denies that The Ohio Electric Power Company holds any franchise or right of any nature, per-

petual or otherwise, to occupy any of the alleys, streets, and public places of the City of Norwalk with its poles, lines, conduits or other equipment for the distribution of electricity. Defendant admits that a corporation known as The Incandescent Light and Power Company was incorporated under the laws of the State of Ohio on March 11, 1891, and says that its Articles of Incorporation state:

> "The purpose for which said corporation is formed is for furnishing to the citizens of Norwalk and vicinity, electric lighting of both arc and incandescent, electric and steam power, and steam and electricity, for heating, for profit."

Defendant further admits that a corporation known as The Northern Electric Company was incorporated under the laws of the State of Ohio on May 17, 1895, and says that the Articles of Incorporation of such company state:

> "Said corporation is formed for the purpose of manufacturing and producing electricity for light, heat, and power."

Defendant denies that either of said companies, by virtue of their respective incorporations, acquired from the State of Ohio, or otherwise, any franchise or right to occupy and use any street, alley, or public place in the City of Norwalk. Defendant further denies that The Ohio Electric Power Company is the successor to any rights held by The Incandescent Light and Power Company or The Northern Electric Company by assignment or otherwise.

Plaintiff admits that The Incandescent Light and Power Company, after its incorporation, acquired all the property and rights of The Norwalk Incandescent Light Company which operated an electric light and power plant and distributing system in Norwalk, Ohio, from October 7, 1890, until sometime subsequent to the incorporation of The Incandescent Light and Power Company, and says that upon acquiring such property and rights, The Incandescent Light and Power Company assumed all of the liabilities and obligations, contractual and otherwise, of The Norwalk Incandescent Light Company, and defendant further admits that all of said property and rights were transferred to The Northern Electric Company, and says that, at the same time, The Northern Electric Company assumed all of the contractual obligations of The Incandescent Light and Power Company

under any contract or grant assigned to The Northern Electric Company by the assignees of The Incandescent Light and Power Company.

Defendant admits that The Northern Electric Company did, in the year 1895, construct a plant in the City of Norwalk for the generation of electricity, but denies that such plant was either large or expensive, and further denies that such plant was constructed in reliance upon any rights acquired by said The Northern Electric Company from the assignees of The Incandescent Light and Power Company. Defendant admits that The Northern Electric Company did maintain and use the poles, wires, conduits and other equipment which had previously been erected in the streets, alleys, and public places of the City of Norwalk, and that such company did make some minor extensions of such equipment, and further admits that said company did operate a plant for the generation and distribution of electric current in said city furnishing current to the city itself and to some inhabitants thereof, but denies that any of such operations, including the building of said generating plant, were made in reliance upon any alleged grant from the State of Ohio or any perpetual rights received therefrom or upon any approval, consent or agreement of said municipality other than a certain contract, dated July 16, 1895, between the City of Norwalk and The Northern Electric Company. Said contract, which by its terms was expressly limited to a period of ten years from September 1, 1895, provided for furnishing said municipality with street lighting and lighting for its public offices and for the erection and maintenance of the plant for the generation of electricity heretofore referred to.

10. Defendant denies all of the allegations of Section 10 of the Bill of Complaint. Defendant says that The Norwalk Incandescent Light Company, a partnership, erected in October, 1890, a system of poles, wires and other electrical distribution equipment in the streets, alleys, and public places of the City of Norwalk, and that such electrical distribution system has been continuously operated and maintained in substantially the same locations, and to substantially the same extent to this day, and is now maintained and operated by The Ohio Electric Power Company. Defendant denies that The Ohio Electric Power Company now has, or ever had, any franchise or other right whatsoever to occupy the streets, alleys, and public places of the City of Norwalk with equipment for the distribution of electricity; and defendant further denies that any of the present holders of any

bonds of The Ohio Electric Power Company, secured by any such alleged mortgage, deed of trust, and supplemental mortgage, ever relied upon any alleged franchise right or other right of The Ohio Electric Power Company to occupy the streets, alleys, and public places of the City of Norwalk with its equipment for the distribution of electricity.

11. Defendant admits the passage of a resolution on March 23, 1926, as alleged in Section 11 of the Bill of Complaint, but denies that the passage of such resolution was in violation of any rights of The Ohio Electric Power Company or of the plaintiff or of the bondholders, as alleged in such section.

12. Defendant admits the allegations of Section 12 of the Bill of Complaint.

13. Defendant admits the allegations of paragraph 1 of Section 13 of the Bill of Complaint as amended by the Second Amendment and Supplement to the Bill of Complaint, and admits that Exhibits "A" and "B" attached to such Second Amendment and Supplement to the Bill of Complaint are true copies of ordinances passed by the City of Norwalk, and further says that such ordinances were accepted by the partnership, The Norwalk Incandescent Light Company. Defendant further says that the provisions of such ordinances limiting the rights granted thereunder to a term of twenty years from the date thereof were valid provisions and were binding upon The Norwalk Incandescent Light Company, its successors and assigns, and all other persons, firms, or corporations claiming or exercising any rights under such ordinances. Defendant further says that all rights to occupy streets of the City of Norwalk under said ordinances expired on October 6, 1910, and that the plaintiff and its alleged mortgagor, The Ohio Electric Power Company, have no rights to occupy the streets, alleys, and public places of the City of Norwalk with electrical equipment or otherwise by virtue of such ordinances.

Defendant denies all the allegations contained in paragraph 2 of Section 13 of the Bill of Complaint.

14. Defendant denies all of the allegations of Section 14 of the Bill of Complaint, except that it admits that the City of Norwalk has never applied to the Probate Court for direction as to mode of use of its streets, alleys, and public places by The Ohio Electric Power Company or any of the predecessors of such company.

15. Defendant denies that the electrical generating and distributing plant, poles, lines, conduits, and other

equipment of The Ohio Electric Power Company in the City of Norwalk are modern and efficient or that said system as a going and operating concern has the value of $140,000. Defendant says that such property now has only a non-productive or junk value and that the fact that some individuals, partnerships, and corporations in the City of Norwalk use electric current furnished by The Ohio Electric Power Company for light, heat, and power contributes nothing to the value of the equipment maintained by The Ohio Electric Power Company in such city and defendant further says that such electrical distribution system, either as a going concern or otherwise, is not a large and substantial portion of the security held by the plaintiff as trustee under the alleged mortgage and deed of trust and supplemental mortgage thereto to The Seaboard National Bank in the City of New York, and that the plaintiff and the owners and holders of any bonds issued by The Ohio Electric Power Company will not be deprived of any substantial portion of their secuirty if The Ohio Electric Power Company is compelled to dismantle and remove from the streets, alleys, and public places of the City of Norwalk its poles, wires, conduits, and other equipment for the distribution of electric current.

Being without information upon the subject, the defendant denies that under the alleged mortgage and deed of trust, and supplemental mortgage thereto, The Ohio Electric Power Company is charged with the performance of any covenant with the plaintiff diligently to maintain, preserve, and renew all rights, powers, privileges, and franchises owned by it and necessary for the business of said company.

16. Defendant denies all of the allegations in paragraph 1 of Section 16 of the Bill of Complaint, except that defendant admits that neither the plaintiff nor any of the bondholders under the alleged mortgage and deed of trust, and supplemental mortgage thereto were parties to, or were served with process or represented in, the quo warranto suit instituted by the State of Ohio to oust The Ohio Electric Power Company from its illegal occupancy of the streets, alleys, and public places of the City of Norwalk. Defendant denies that it has ever threatened to take any summary action to dismantle or remove the property of The Ohio Electric Power Company from the streets, alleys, and public places of the City of Norwalk. Defendant says that after the failure of The Ohio Electric Power Company to comply with the resolution of the City Council of the City of Norwalk

passed March 23, 1926, referred to in Section 11 of the Bill of Complaint and Section 11 of this Answer, the defendant filed a complaint with the Prosecuting Attorney of Huron County, Ohio, against the illegal occupation of its streets, alleys, and public places by such company. It further says that neither the passage of such resolution nor the filing of such complaint nor any other acts or alleged threatened acts of the defendant constituted any impairment of the obligation of any contract between the State of Ohio and The Ohio Electric Power Company, or constituted the taking of property of the plaintiff without due process of law, or constituted irreparable damage to the plaintiff.

Being without information upon the subject, defendant denies that The Ohio Electric Power Company and its predecessors in title have ever been assessed by the officers and authorities of Ohio, and/or Huron County, Ohio, on account of any alleged perpetual franchise rights and further says that the defendant has never had knowledge of any such assessment and has never been in a position to object to such assessment if any in fact took place. The city has never acquiesced in such assessment or knowingly received any moneys or other property from Huron County or from the State of Ohio, which arose directly or indirectly from any tax or assessment levied upon the alleged perpetual franchise rights of The Ohio Electric Power Company. Defendant denies that it is estopped to assert against the plaintiff that the plaintiff does not, as trustee, hold as security for the bonds of The Ohio Electric Power Company a valid and subsisting perpetual franchise, or that there is now no agreement between the defendant and The Ohio Electric Power Company as to the mode of use of the streets, alleys, and public places of the defendant.

17. Defendant denies the allegations appearing on page 12 (a) of the Bill of Complaint to the effect that the defendant by physical force commenced to remove the wires, poles, and other equipment of The Ohio Electric Power Company from the streets, alleys, or public places of the City of Norwalk in a manner dangerous to the public safety, or otherwise.

18. Defendant admits the allegations of Section 1 of the Amendment and Supplement to the Bill of Complaint.

19. Defendant denies all of the allegations of Section 2 of the Amendment and Supplement to the Bill of Complaint.

20. Defendant denies all of the allegations of Section 3 of the Amendment and Supplement to the Bill of Complaint.

21. Defendant further says by way of answer to the Bill of Complaint that, if any predecessor or predecessors of the plaintiff ever had any rights to occupy or use the streets, alleys, or public places of the City of Norwalk for the erection and maintenance of equipment for the distribution of electricity, such rights or franchises were waived and terminated by a certain contract, dated April 13, 1905, between the defendant and The Cleveland and Southwestern Traction Company, an Ohio corporation, through which the plaintiff claims the rights which it alleges it received from its alleged predecessors, The Incandescent Light and Power Company and The Northern Electric Company. Said contract provides for the lighting of the streets and public buildings of the City of Norwalk, and further provides that said The Cleveland and Southwestern Traction Company, its successors and assigns, would remove all poles, posts, lamps, wires and other apparatus or material of every description from the streets, alleys, and public places of the City of Norwalk, upon the termination of such contract, on or about August 31, 1915.

22. Defendant further says that the Bill of Complaint, the Amendment and Supplement thereto, and the Second Amendment and Supplement thereto, do not state a cause of action for the reason that it is apparent upon the face hereof that the State of Ohio is a necessary party to this action.

23. Defendant further says that the Bill of Complaint, Amendment and Supplement thereto, and the Second Amendment and Supplement thereto, do not state a cause of action in equity.

Wherefore, defendant prays that the Bill of Complaint be dismissed and that it have judgment for its costs herein expended and that it may be granted such other and further relief as to the court may seem meet and proper in the premises.

G. Ray Craig,
W. A. Eversman,
Counsel for the City of Norwalk.
September 15, 1930.

Receipt of copy of the foregoing is hereby acknowledged.

Tracy, Chapman & Welles,
Solicitors for Plaintiff.

THIRD AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Nov. 12, 1930)

Now comes The Chase National Bank of the City of New York, having been substituted as plaintiff herein, and by leave of court first obtained files this its third amendment and supplement to the bill of complaint herein, and further complaining of defendant, for its cause of action against defendant, says that it is informed and believes and, therefore, avers that:

The city council of the defendant, City of Norwalk, on July 1, 1924, passed an ordinance in terms requiring all electric light and power wires, telephone, signal and trolley wires in operation in the City of Norwalk to be constructed and maintained in accordance with specifications thereinafter set forth in great detail. Said ordinance was intended and did amount to a consent to such companies, including the predecessors of the Ohio Electric Power Company and said last named company, to use the streets and public ways of said city in the manner and upon the terms and conditions therein set forth.

The defendant city thereafter repeatedly, during the period between July 1, 1924, and the date of the beginning of this suit, notified and directed the Ohio Electric Power Company to comply with certain provisions thereof which required that upon discontinuance of any service the wires and poles used as service lines be removed from the streets and alleys; said Ohio Electric Power Company duly complied with said notices and with all of the terms of said ordinance and accepted the same as applying to it, and the defendant city by said ordinance and notices and directions thereby recognized that the predecessors of the Ohio Electric Power Company and said company respectively were rightfully maintaining and operating said electrical distribution system in the streets and public places of Norwalk. No further, other or different ordinance has since been passed by the council of said city changing or repealing the provisions of said ordinance of July 1, 1924, with respect to the mode of use of the streets and public ways of said city by electric light and power companies.

That by reason of the facts in plaintiff's bill of complaint and herein set forth, there is now, and at all times has been, in full force and effect a consent by said city to the use of its streets and public ways, and an agreement as to the mode of such use, by the Ohio Electric Power Company and its several predecessors.

The defendant, the City of Norwalk, by reason of the facts aforesaid, as well as those set forth in plaintiff's bill of complaint as heretofore amended and supplemented, is now estopped to assert that there is now no existing agreement between it and the Ohio Electric Power Company as to the mode of use by said company of the streets and public ways of said city, and is estopped to assert that no such agreement ever existed, and is estopped to assert that the Ohio Electric Power Company does not now possess a perpetual franchise in the streets and public places of the City of Norwalk with the existing right to use said streets either in the mode of use prescribed by said ordinance of October 7, 1890, or by said ordinance of July 1, 1924.

Wherefore plaintiff prays for relief as in its bill of complaint heretofore filed herein.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Geo. D. Welles,
Earl F. Boxell,
Of Counsel.

ANSWER TO THIRD AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Nov. 12, 1930)

The defendant, for its answer to the third amendment and supplement to the bill of complaint, says:

1. It admits that the city council of the defendant on July 1, 1924, passed an ordinance entitled: "An Ordinance to regulate the construction and maintenance of electric light and power wires, telephone, signal, and trolley wires." It denies that said ordinance was intended and did amount to a consent to any company, including the predecessor of the Ohio Electric Power

Company or said Ohio Electric Power Company, to use the streets and public ways of the City of Norwalk in the manner and upon the terms and conditions in said ordinance set forth.

2. Defendant says that since the passage of said ordinance defendant has issued notices and orders to various companies, including the Ohio Electric Power Company, to comply with certain provisions of said ordinance. Defendant denies that it thereafter repeatedly, during the period between July 1, 1924, and the date of the beginning of this suit, notified and directed the Ohio Electric Power Company to comply with certain provisions thereof which required that upon discontinuance of any service the wires and poles used as service lines be removed from the streets and alleys; that said Ohio Electric Power Company duly complied with said notices and with all of the terms of said ordinance, and accepted the same as applying to it, and that the defendant city, by said ordinance and notices and directions, thereby recognized that the predecessor of the Ohio Electric Power Company and the Ohio Electric Power Company respectively were rightfully maintaining and operating said electrical distribution system in the streets and public places of Norwalk. Defendant admits that no further, other, or different ordinance has since been passed by the council of the City of Norwalk, changing or repealing the provisions of said ordinance of July 1, 1924.

3. Defendant denies that by reason of the facts in plaintiff's bill of complaint and its third amendment and supplement to bill of complaint there is now and at all times has been in full force and effect a consent by said City of Norwalk to the use of its streets and public ways and an agreement as to the mode of such use by the Ohio Electric Power Company and its several predecessors.

4. Defendant denies that it is now estopped to assert that there is now no existing agreement between it and the Ohio Electric Power Company as to the mode of use by said company of the streets and public ways of said city, and denies that it is estopped to assert that no such agreement ever existed, and denies that it is estopped to assert that the Ohio Electric Power Company does not now possess a perpetual franchise in the streets and public places of the City of Norwalk with the existing rights to use said streets either in the mode of use prescribed by the ordinance of October 7, 1890, or by said ordinance of July 1, 1924.

Wherefore, defendant prays that the bill of complaint and the several amendments and supplements thereto be dismissed and that it have judgment for its costs herein expended.

G. Ray Craig,
W. A. Eversman,
E. G. Martin,
Rex F. Bracy,
Solicitors for Defendant.

November 12, 1930.

We hereby certify that a copy of the foregoing was served upon Messrs. Tracy, Chapman & Welles, solicitors for plaintiff, this 12th day of November, 1930.

Geo. D. Welles.

NARRATIVE STATEMENT OF TESTIMONY UNDER NEW EQUITY RULE 75 AND IN COMPLIANCE WITH RULE 15 OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed Nov. 21, 1931)

Appearances: For the Plaintiff: George D. Welles, Esq., and Earl F. Boxell, Esq., of Tracy, Chapman & Welles, Toledo, Ohio.

For the Defendant: G. Ray Craig, Esq., E. G. Martin, Esq., and R. F. Bracy, Esq., of Norwalk, Ohio; Walter A. Eversman, Esq., and Hugh C. Laughlin, Esq., of Williams, Eversman & Morgan, Toledo, Ohio.

This cause came on for hearing in the United States District Court for the Northern District of Ohio, Western Division, on November 12, 1930, before the Honorable George P. Hahn, District Judge, and the following proceedings then took place:

Opening statements were made to the court by counsel for the respective parties.

The plaintiff then offered in evidence, separately, Plaintiff's Exhibits 1 to 47, both inclusive.

Plaintiff's Exhibit 1 was admitted over the objection of the defendant to all statements therein relative to the payment of taxes by the Ohio Electric Power Company and its predecessors, and the defendant was allowed an exception. Plaintiff's Exhibits 2 to 47 were admitted without objection by the defendant.

DEPOSITION OF CHARLES SUHR

It was stipulated by counsel that although Charles Suhr was available, his deposition, which had been previously taken at Norwalk, Ohio, on the ground that he was aged and infirm, might be offered in whole or in part, by either party, subject to objection as to materiality or relevancy. All of the deposition of Charles Suhr, with the exception of those parts which are hereinafter quoted verbatim and which show objections by plaintiff, was offered by the plaintiff. Those parts of the deposition quoted verbatim and objected to by plaintiff were offered by the defendant and received subject to the objections of the plaintiff stated therein and its exception.

CHARLES SUHR,

being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I am past 69 years of age and live at, and always have been a resident of, Norwalk, Ohio, where I am engaged in the practice of law. For six years I was probate judge of Huron County, Ohio, and was city solicitor

of the City of Norwalk for nearly seven years, my time as solicitor expiring January 1, 1930. In 1890, I was connected with the Norwalk Incandescent Light Company, a partnership. The other members of the partnership were Thomas Dunmore, Dr. D. W. Vail, E. D. Sawyer, myself and I think Eugene Smith and Judge D. H. Fox were also members.

Dunmore resided in Norwalk and was a plumber and steamfitter; Sawyer, a former sheriff of Cuyahoga County, resided in Cleveland; Eugene Smith, a sheriff of Huron County, resided in Norwalk; D. H. Fox had been probate judge of Huron County and was president of The Huron County Banking Company at the time of the organization of the partnership; and Dr. Vail was postmaster.

Dunmore, Vail, Sawyer, Smith, and Fox are all dead. Dr. Vail died within the past three years and the other partners twenty or twenty-five years ago.

When the partnership was organized in the middle of 1890, I was engaged in the practice of the law. In 1890, the members of the partnership met together and agreed upon what we would do. The object of the formation of the partnership was to furnish electric current for light and power.

The only partnership records kept were books of account. No record of any partnership proceedings was kept. The books of account showed the financial transactions of the company and that is all. I kept those books in my office. The partnership first leased a piece of land for a period of five years, on which it constructed a frame and brick building and in it were installed two generators and the necessary boilers and equipment for running the machinery. This plant was erected on East Seminary Street, the first street south of Main Street running parallel with it in an easterly and westerly direction. The generating plant was on the south side of the street. The steam generated from two or three boilers operated an engine, which propelled the dynamo for electric current. The dynamos were of the Thompson Huston system, and there were two generators, one producing alternating current for residential incandescent lighting and the other direct current for arc lights used for street lighting. Poles and wires were erected and a large number of transformers installed to furnish current for business and residences wherever we could go. The poles and lines were established on East and West Main Streets, Benedict Avenue, Whittlesey Avenue, and on other streets arc lights were installed, just where I

can not tell. The lines were strung on poles located on one or the other side of the street and all inside the public streets. In some instances, cross-arms were used on the poles and glass insulators. The transformers used to step down the energy for either commercial or residential purposes were erected on the poles.

Main Street in Norwalk at that time was approximately three miles in length and the lines extended about two miles through Main Street and through the business section. The business section through Norwalk on Main Street extends about one-half mile. There is little difference between the length of the business section of Main Street in 1890 and its present length. The lines for the transmission of the alternating current and the lines for the transmission of the direct current, all starting from the generating plant on Seminary Street, were put on the same pole line.

Upon the formation of the partnership, about the middle of 1890, it commenced to install machinery in its plant and to erect transmission lines.

"Q. I will ask you what the fact is as to whether or not you have any personal knowledge as to any application of the partnership being made to the City of Norwalk, the city council, for a franchise on the streets for the erection of the poles and stringing of the wires?"

Objection by the plaintiff upon the ground that the question is put in such a manner as to assume that, in compliance with the ordinance of October, 1890, it would grant a franchise.

"A. I do.

Q. Did you personally have anything to do with that?"

Objection upon the grounds stated in connection with the previous question.

"A. I was there at the council, Mr. Dunmore was there, and I think someone else. I don't know but what they all were there.

Q. Judge, I call your attention to Exhibit A attached to second amendment and supplement to bill of complaint, and will ask you to read it. A. Yes, sir.

Q. Do you recognize Exhibit A attached to second amendment and supplement to bill of complaint as being the ordinance that was passed by the City of Norwalk to the Incandescent Light Company of Norwalk, Ohio, on July 30, 1890? A. Yes, sir, I do.

Q. Is that the ordinance that was passed by the council of the City of Norwalk at a meeting where you and Mr. Dunmore were present? A. Yes, sir.

Q. Do you remember what, if anything, was said either by yourself or Mr. Dunmore, in the presence of the council immediately after the passing of that ordinance? A. My recollection is Mr. Dunmore getting up and thanking the council for granting the franchise, and made some further remarks, I don't remember what they were."

On October 7, 1890, I was before the council of the City of Norwalk, when the ordinance of October 7, 1890 (Exhibit B attached to second amendment and supplement to bill of complaint) was passed. The second ordinance dated October 7, 1890, was passed because when the first ordinance dated July, 1890 (Exhibit A attached to second amendment and supplement to bill of complaint) was passed, it provided for what was known as the Heisler System. The partnership changed their notion as to the installation of the Heisler System and, in order to install any other system they had to have the ordinance or franchise changed and for that reason they had the council pass this ordinance in October.

After the passage of the ordinance of July, 1890, Norwalk Incandescent Light Company, the partnership, then erected the poles, strung the wires and installed the necessary generating machinery. The partnership commenced business after the passage of the second ordinance and furnished some current shortly thereafter. After the passage of the ordinance in October, 1890, it carried on its business of furnishing street lighting and domestic lighting, to full capacity. The partnership made a contract with the City of Norwalk to furnish lighting for street purposes, but I do not remember its contents.

Norwalk Incandescent Light Company, the partnership, furnished lighting on the streets of Norwalk over its lines carrying direct current and at the same time furnished electricity for commercial purposes over its lines for alternating current, and that business continued until some time in the spring of 1891, when there wasn't any change except the partnership was incorporated in the name of Incandescent Light & Power Company, under the laws of Ohio.

Norwalk Incandescent Light Company had a written contract for street lighting after it commenced to do business and before the organization of the corporation.

Exhibit 3 is a copy of the articles of incorporation issued by the Secretary of State of Ohio to Incandescent Light & Power Company, of Norwalk, Ohio. I was acquainted with the incorporators. The name Dunmore

is spelled in the articles of incorporation "Dinsmore." Judge Fox was president; I was secretary and treasurer, and Tom Dunmore was general manager.

A set of corporation books was opened by Incandescent Light & Power Company consisting of the record of incorporation and of the meetings held by the corporation. Both directors' and stockholders' meetings were recorded therein and I had charge of the books. There was a corporation minute book and a stock book also, and a set of account books, journal, ledger and cash book and I was custodian of them during the time Incandescent Light & Power Company did business. These books were kept in my office in the Stewart Block, where I maintained my law office.

Incandescent Light & Power Company followed Norwalk Incandescent Light Company and was engaged in the business of furnishing electric current, power and light for three or four years.

There was no difference in the business carried on before and after previous incorporation. When the business was turned over by the partnership to the corporation, there was a formal transfer of all property. It was a written bill of sale and included all the things, everything we had.

"Q. Name the things it included as well as you can recall them at this late date.

To which question plaintiff objected unless the bill of sale is shown.

"A. It included the contract for lighting the streets, the franchise that was granted to us in October of 1890.

"Q. That is the franchise from the City of Norwalk?

To which question plaintiff objected on the ground it assumes the ordinance of 1890 was a franchise.

"A. Yes.

"Q. Do you refer to Exhibit B attached to second amendment and supplement to bill of complaint? A. Yes.

"Q. The franchise of October, 1890?

To which question plaintiff objected on the ground it assumes the ordinance of October, 1890, was a franchise.

"Q. Do you recall anything else? A. All the machinery, poles and equipment, transformers, everything the partnership had in any shape or form pertaining to the business."

Exception by the plaintiff to the introduction of the foregoing quoted testimony.

The transfer was executed by the partnership and transferred the property to the corporation, The Incandescent Light & Power Company, and as secretary of the corporation, a record of the transfer was made by me in the corporation records. All the property, which I have described, consisting of the generating plant on Seminary Street and the distribution system carrying the two lines of alternating and direct current, was turned over to the corporation and thereafter The Incandescent Light & Power Company operated it.

There was seemingly no change in the mode or method of operation, from what it had been prior to the time of the transfer. No different equipment was used by the corporation than had been used by the partnership, and no change in the business methods with reference to the public. I continued to keep the books and Dunmore continued to run the business.

After the partnership commenced to do business, the lines were extended and continued to extend during the life of the partnership, and thereafter the corporation continued to extend the lines and did so until the assignment. During the time the corporation was in operation, I was the sole custodian of the documents of the corporation. After the corporation had been in existence three or four years, it made an assignment in the Probate Court of Huron County, Ohio, to F. H. Jones and J. W. Foster. I continued to keep the corporation books, but the account books were turned over to the assignees. Exhibit 4 is the deed of assignment from The Incandescent Light & Power Company to Jones and Foster. It was executed by D. W. Vail and myself, as secretary, and filed in the Probate Court. I was the custodian of the books of the corporation, except the account books, until a case was commenced in the Common Pleas Court of Huron County March 8, 1893, by one George Cutter against The Incandescent Light & Power Company. Exhibit F is the petition filed in that case, which was referred to Mr. Kennan, as master commissioner. I was called as a witness in the Cutter case and all the books of the corporation were turned over to him as master commissioner and I do not remember of having seen them since. I attended hearings held before the master commissioner in the Gardiner Block and in the old court house, but after the books, records, papers and documents of the corporation were turned over to Kennan, as master commissioner, they were never again in my custody. I do not know where they now are, but I guess scattered to the four winds of heaven. They

were all deposited upstairs in the attic of the old court house.

As papers accumulated in the office of the clerk of the Court of Common Pleas and the clerk of the Circuit Court, they were placed in the attic of the old court house and I remember once I saw the old stock book of The Incandescent Light & Power Company in the attic of the old court house, before it burned. I do not remember when it burned, but the present court house was built about 1913 or 1914. The old court house was destroyed by fire I think in 1911 or 1912, not long after I left the probate office. I saw the fire. It originated in the attic in a room adjoining the one where the records were kept. All the contents of the room, where the surplus files were placed, were destroyed. The fire burned the entire second and third stories and not a thing was salvaged.

The written instrument that was executed by the partnership to the corporation that covered the franchise, Exhibit No. 2, and the other items of property that belonged to the partnership, to which I have referred, was with the records of the corporation. I couldn't say what became of it. It is not in my custody. I have looked for it. Everything pertaining to this corporation that I had at the time of the hearing of this case, was turned over to the master commissioner.

The written instrument or paper covering the franchise and other items of property transferred by the partnership to the corporation was turned over to the commissioner, C. L. Kennan, who was a practicing lawyer in Norwalk and who has been dead ten years. The minute book or record book of the proceedings of the stockholders and directors to the corporation and the stock book were all turned over to the master commissioner. I had nothing to do with the business affairs of Incandescent Light & Power Company after the assignment in the Probate Court and the delivery of those records, books and papers to the master commissioner.

There is very little difference between the location of the lines of Incandescent Light & Power Company and the lines of Ohio Electric Power Company as they exist today. There have been some extensions. They have kept up their lines, replacing poles when they were destroyed by the elements, and, also, wires. The lines originally laid out and extended by The Incandescent Light & Power Company cover substantially the same streets and the same portions of streets in the City of Norwalk as the lines now used by Ohio Electric Power Company.

After I turned over the books, records, papers and documents of Incandescent Light & Power Company to Kennan, the property was still in the hands of the assignees, who later sold it. The assignees operated the property for a certain period of time, the length of which I do not remember. I think Burt Foster or some relative—his wife I believe—bought the property and sometime thereafter the Seminary Street generating plant was dismantled and they built a plant, which still stands in the valley south of the Wheeling & Lake Erie tracks. The buildings are there now and I think they have some machinery. It was a sort of combination of gas and electric plant. Aside from the change in the place and the building, there has been no change in the distribution system and in the location of the poles and wires in the streets. The two systems for commercial and domestic use were still continued and the physical property, wires, poles and insulators have continued to be operated right along and are operating at the present time. I would not say that the same poles are there. As they decayed, they replaced them, but it is the same system and same location and, in some instances, the same wire.

After Foster acquired the property, a corporation was organized as I understood known as The Northern Electric Company and thereafter several changes were made and the property was finally taken over by the Cleveland Southwestern Traction Company. When The Cleveland Southwestern Traction Company, subsequently known as The Cleveland Southwestern & Columbus Railway Company took over the property, the same poles and lines, which had been originally constructed by the partnership were still in use with no change in the location.

I remember that the Municipal Light Plant of the City of Norwalk went into operation in 1914 or 1915, and up to that time The Cleveland Southwestern Railway Company had been supplying electricity for the City of Norwalk, both domestic and commercial, and the only change in the manner of producing and in the manner of transmitting electric energy throughout the city was the discontinuance of the arc light with the expiration of the contract with The Cleveland Southwestern.

During the existence of the corporation known as Incandescent Light & Power Company, of which I was secretary, and the operation of the same property by the assignees and then by Foster and the successive companies down to the operation by the Cleveland Southwestern Traction Company, the same poles were used for the two sets of wires, one for alternating and the other for

direct current. The direct current was used for the municipal lights and the alternating for domestic and commercial purposes. I think that the present building containing the generating plant was built about 1895 or 1896. There has been no addition to it and it is just as it was originally. It was built for a gas plant, which was discontinued. The partnership never owned the land, upon which it built its original plant. It belonged to Frank Lake and Georgia Rexford. Exhibit U is the lease executed by Lake and Rexford to Norwalk Incandescent Light Company. There was no difference between The Incandescent Light Company and The Norwalk Incandescent Light Company, both names referring to the partnership.

Before the formation of the partnership, a corporation known as Western Electric Company had a plant on Woodlawn Avenue and furnished direct current for city streets. It furnished the first street lighting used in Norwalk. It had probably been in operation ten years before the partnership commenced to operate. Western Electric Company furnished electricity only for street lighting. It ceased to do business after the formation of the partnership in 1890. After the partnership commenced to furnish electricity for lighting, Western Electric Company took their machinery out of town. Western Electric Company did no incandescent lighting. The first incandescent lighting in the City of Norwalk was furnished by the partnership, with which I was connected. There was no difference between the character of the business carried on by the partnership and the character of the business carried on by the corporation.

A man of the name of D. C. King, who was one of the incorporators of The Incandescent Light & Power Company is dead. When Dr. Vail died, he was a resident of the State of Washington. When the quo warranto case against Ohio Electric Power Company was commenced, I was City Solicitor and we tried to locate Dr. Vail, but he did not live long after he was located and, at the time we learned where he was, I understood his health was very bad and that he died in a short time thereafter.

The partnership built the original plant, installed the machinery and extended the lines, and the money was furnished by the partners. It is hard to say how much money they expended, but I estimate it at $35,000 or $40,000.

There was no property that was not included in the transfer to the corporation. When the property was

turned over by the partnership to the corporation, Mr. Dunmore and one or two other parties interested and I appeared before the Council and Mr. Dunmore thanked the members of the Council very kindly and we left.

"Q. And then did the corporation continue in the same way with the city? A. Yes.

"Q. Was its relation with the city the same as it had been? A. Exactly the same.

"To which question plaintiff objected for the reason it calls for a conclusion."

CROSS EXAMINATION

By Mr. Boxell:

Referring to Exhibit A attached to second amendment and supplement to bill of complaint, the ordinance of the city of July, 1890, the partnership had come into existence sometime before that date, but how long before I do not know. I think it was organized about July 1, 1890. I think the partnership agreement was in writing, but would not say positively. I have no idea where the written agreement is today. If there was an instrument drawn, it was left with me. I kept all the papers, records, everything. The partnership agreement was filed with the rest of the papers and I don't recall of ever seeing it, if it was written. It was mixed up with the rest of the papers that came into the final hearing of the case. The partnership agreement was not transferred to the corporation, but filed with the papers, burned up in the Cutter case. When I was called as a witness in the Cutter case, I was asked to bring the files of the corporation and the papers were all together. If there was an agreement, it was with them. The partnership agreement was in the files of the corporation. All corporation files were turned over to the court in the Cutter case, except the accounts which were turned over to the assignees.

I do not think I was called on to turn over the partnership agreement in the Cutter case, as it had nothing to do with the case. There were no carbon copies of the partnership agreement and I know of no additional copy. I assumed there was a written agreement and if there was the boys signed it and left it with me. I am not saying there was a written agreement, but think there was, and I may be mistaken when I say I turned over the partnership agreement to the court. I have made no special search. I think if I had it, I would have come across it. I don't know where I would look for it, but

I think I had it. Dunmore, Sawyer and Vail were particular fellows and they may have asked for it and taken it away. I may possibly have it, but I do not know where to look for it. I haven't the slightest idea.

I do not know in what proportion the partners contributed to the expenditure of $35,000 or $40,000 and could not recall approximately. There were five or six partners. While there was quite a little money contributed by the several partners, there was not $35,000 contributed, because there was some liability and the partnership had to assume it. The partnership assumed such liability in the course of its business and when the corporation was formed, they took it over. I do not believe that actually $35,000 or $40,000 in money was paid in and I couldn't tell the actual amount which the partnership put in. The equipment had cost that much and we were liable for some balance that did not actually go in. The partners were all jointly liable. We entered into the partnership on an equal basis. It was the purpose of the partnership, upon its formation, to form a corporation. That was the original purpose and it was contemplated that the partnership should have stock issued to them in proportion to the amount of money they had actually put into the partnership. There was a difference in the amount of stock held by the respective partners, depending upon the amount of money they put in. When the corporation was formed, each partner received stock in proportion to what he had put in. The name of the corporation which was formed in 1891 was The Incandescent Light & Power Company.

The city has not changed much in reference to its area since 1891. I think the corporation lines are today substantially the same as they were in 1880.

I do not think the partnership actually installed poles and wires in the city until they received that franchise. When I refer to the franchise of July 30, 1890, I refer to the ordinance which the City Council of Norwalk passed on the evening of that day, Exhibit A attached to second amendment and supplement to bill of complaint in this case.

The incorporators of The Norwalk Incandescent Light & Power Company were identical with the partners of Incandescent Light Company, with the exception of D. C. King, who I believe, was not a member of the partnership, but I wouldn't say positively. It is possible he was a member of the original partnership. If he was one of the partners, then they and the incorporators of The Norwalk Incandescent Light & Power Company were the same.

The partnership made an application to the council in July, 1890. No written application for an ordinance was presented, other than the ordinance itself. I have no copies relating to an application. Mr. Dunmore and I were present at the meeting of the council and asked for certain privileges in the city. I do not recollect who prepared Exhibit A attached to second amendment and supplement to bill of complaint, the ordinance of July 30, 1890, but it was presented to the council. I do not know who prepared it, unless I did. When Exhibit A attached to second amendment and supplement to bill of complaint was submitted to the council, I wouldn't say that I notified the council that it was the intention of the partnership to form a corporation and turn whatever rights the city might give to the partnership over to the corporation, because I don't remember, nor do I recollect that Mr. Dunmore said anything of the kind.

It was the partnership's intention to form a corporation. Council meetings were not held so formally those days. I think the council was composed of six or eight members and we would get around the table and talk about this thing, and this one would spring this and this one that, and there were a lot of things said. The matter contained in Exhibit A attached to second amendment and supplement to bill of complaint (ordinance of the city dated July 30, 1890) was read in the usual way, but no discussion by the council ensued therefrom. There might have been some discussion before among the members, but not as a body, in the presence of Mr. Dunmore and myself. We were all around the table. It was made evident to council that the ordinance contained the words that the rights purported to be granted by it should accrue to the partnership, its successors and assigns, and the council members knew that. There was one or two pretty good fellows on the council at that time. The fact that the words "successors and assigns" were in the ordinance as presented does not refresh my recollection as to whether or not the corporation was discussed at the time.

The same procedure was followed with respect to Exhibit B attached to second amendment and supplement to bill of complaint (ordinance of the City of Norwalk passed October 7, 1890). The ordinance of October 7, 1890, was presented to the council already prepared, with no written application. Mr. Dunmore and I very frankly told the city council what we proposed to do. A matter of that kind is often taken up before with each individual councilman and talked over. They in-

vestigate those things and when they come to the meeting of the council they perhaps had some questions to ask. We gave them what information we could with reference to it and after they got the information they went into session and passed the ordinance.

I do not recall that there was any discussion by the council members on Exhibit B attached to second amendment and supplement to bill of complaint. The only thing I remember about it is my attention was called to the kind of system. When my attention was called to the ordinance, Exhibit A attached to second amendment and supplement to bill of complaint (ordinance of July 30, 1890), they insisted upon the installation of the Heisler system, and I remember there had been a change and I think some of the members of the council had been informed it was not the system we should have in the city.

Prior to the passage of both the ordinances, we had some discussion with individual members of the council and didn't spring it all of a sudden; various questions were put to us by members of the council both prior to the meetings and at the meetings, with reference to the partnership plans and we put our cards on the table and didn't withhold any information from the council and they were glad to have us come in and we told them what our plans were.

The transfer by the partnership to the corporation was in writing and it is my impression it was in the character of a bill of sale. It was a written transfer of the property to the corporation and was not recorded in any of the county or city offices. I am positive as to that. About the time the transfer was made, Dunmore and I went to council and talked the matter over and I don't doubt it was talked over before and, when the council convened that night, one of them made some kind of a—I don't think it was a written resolution—confirming the transfer from the partnership to the corporation, and we didn't stay long. I think Mr. Vail was with us, but I am not sure. The council took action upon that request and confirmed our action as partners in transferring the partnership property to the corporation, but I couldn't tell you what the character of the application was. Before leaving, Mr. Dunmore thanked the council for doing what they had done, and we left, for our business was over.

At the meeting of July 30, 1890, when the ordinance of that date—Exhibit A attached to second amendment and supplement to bill of complaint—was passed, Mr. Dunmore thanked the council for passing the ordinance.

He invariably thanked the council. He was just that kind of a fellow. He accepted the grant, and the same procedure was followed, after the passage of the ordinance of October 7, 1890. There was no written acceptance on either occasion. The transfer from the partnership to the corporation was signed by all of the partners and after that we asked the approval of the council to the transfer. The matter of their approval I don't doubt had been taken up with them individually prior to that occasion. There is no question but what the council had been acquainted with the fact that a corporation was being formed. That is the way we do things in a little city, go and see them before.

During the time the partnership operated the plant and the distributing system in the city for electric current, some additions were made to the system and there was a constant expansion all the time and when demands were made for additional lights, we put in the necessary equipment and extensions were made from time to time and the corporation, also, made extensions from time to time. I would not say that these extensions substantially covered the city for people were not using incandescent lights then like they are today. A good many streets did not have them, excepting arc lights, but the incandescent system covered the city, so far as there was a demand for domestic use, and whenever the city desired arc lighting and wanted a light we put it in and that required equipment. I had nothing to do with securing permits from the city authorities for the partnership and corporation, but I expect they secured permits. Mr. Dunmore did that. He was general manager. In those days, there was a street commissioner and we would tell him we wanted to locate a pole or do some work and it was granted without a permit. The street commissioner is called a director now, director of public service, and he performs the same functions with reference to the use of the streets.

All the properties that the partnership had, whatever character they were, were conveyed to the corporation, which succeeded it, and the corporation, The Incandescent Light & Power Company, conveyed all the same property to the assignees, Foster and Jones, and then all of this property with the extensions or additions was transferred by them to Mrs. B. P. Foster and a man of the name of Jones.

About 1895, I understand that The Northern Electric Company, a corporation, was formed by B. P. Foster. It was Burton Foster's Company, but I do not

know which one preceded the other. At that time, the old generating plant was dismantled and The Northern Electric Company erected a new brick plant located in the valley by the Wheeling & Lake Erie tracks, and the location of the present Ohio Electric Power Company is the same place and the same building.

After the formation of The Northern Electric Company and its acquisition of the properties, I suppose it made extensions to the lines in the city, but not to any large extent. My understanding is that the same system of transmission by poles and wires, which the partnership and the successor corporation had, was connected with the new generating plant on Water Street, and this same system with the replacements which have been made from time to time, poles and wire extensions covering substantially the same streets, alleys and places in the city, is the same system that was used by The Northern Electric Company and the companies which succeeded it down to Ohio Electric Power Company and is still being used now. The successor to The Northern Electric Company furnished street lighting for the city to about the time of the erection of the Municipal Plant in 1913 or 1914. It might have been about 1915. I am not familiar with the date, having had no occasion to look it up.

During the period from 1890 to the present, there was no concern, outside of the successors of the original partnership distributing electric current in the city, either to the city or private consumers, unless it might be some private concern. I do not know of any public utility. No outside company offered any service.

RE-DIRECT EXAMINATION

By Mr. Craig:

Refreshing my recollection, I remember that Mr. Craig asked me to make an extensive search of all my files to see if I could find any of the papers or records of the corporation, and I made that search and could find no trace of any Incandescent Light & Power Company's papers or any writing covering the transfer of all the items or the partnership agreement. I don't know where to look for any such papers. I recollect Mr. Craig requesting me to make a search and I did look where I usually keep old papers, but I did not expect I would find any and I didn't find any. I have nothing at all in any shape or form.

Mr. Vail was one of the partners. I said something about his being an incorporator, but he might have been out of town. The law required five I believe, I don't recall whether King was a partner. There were a few of those fellows I knew were partners, and one or two of the other fellows I don't know. I can tell you the fellows I know were partners but there are one or two I wouldn't want to say. When the partnership was organized and at the time it acquired the ordinance passed by the council July 30, 1890, I do not recall that there was any fixed time within which the corporation would be organized. We had no definite plans, but during the time of the organization I recall talking it over with some of them. I recall talking about incorporating the company.

RE-CROSS EXAMINATION

By Mr. Boxell:

Dr. Vail was one of the original partners.

RE-RE-DIRECT EXAMINATION

By Mr. Craig:

People who had nothing to do with the original organization became stockholders.

W. R. Huntington contributed the greatest amount of money as a stockholder. Mr. Huntington was not connected with the partnership. I think his business must have been spending money. At one time, he was connected with some coal business. He and Ed Sawyer were very warm friends.

RE-RE-CROSS EXAMINATION

By Mr. Boxell:

Upon the transfer by the partnership, the original partners at that time or thereafter received their stock in payment of the transfer and each one became a stockholder, that was for each one's share in the partnership, whatever it was. Just what their interest was, I do not remember.

W. R. Huntington was name of the man from Cleveland. He took stock after the organization, after the partners received their share of stock in the corporation.

NARRATIVE STATEMENT OF DEPOSITION OF BURTON P. FOSTER,

Taken on behalf of the Plaintiff

The plaintiff offered the direct and redirect examination in the deposition of Burton P. Foster and the defendant offered the cross examination therein. Both were received as read by the court subject to objections and exceptions hereafter set forth.

DIRECT EXAMINATION

By Mr. Boxell:

My name is Burton P. Foster and I reside at, and have been a resident of, Toledo, Ohio, about five years. I lived in Norwalk, Ohio, from 1895 until 1899 and there operated the electric light and gas plant supplying the City of Norwalk. I had been in the same business since 1888 and when I went to Norwalk in 1895, I organized an Ohio corporation under the name of The Northern Electric Company with its place of business at Norwalk.

Plaintiff's Exhibit 6 appears to be the Articles of Incorporation of The Northern Electric Company, which I formed. Upon going to the City of Norwalk, in 1895, I purchased the property of The Incandescent Light & Power Company from its trustees at an assignees' sale and at public auction. I personally attended the auction in the City of Norwalk and directed the assignees to make the conveyance to my wife, Mayme C. Foster, and George P. Jones.

Plaintiff's Exhibit 5 appears to be a deed of sale by the assignees to George P. Jones and Mayme C. Foster and is the deed covering the property, which I purchased from the assignees of The Incandescent Light & Power Company. The property which I purchased from the assignees of The Incandescent Light & Power Company embraced a plant for the production of electric energy. I purchased no real estate.

The deed identified as Exhibit 5 was duly delivered by the assignees to Mrs. Foster and Mr. Jones. Upon the delivery of that deed by the assignees to Mrs. Foster and Mr. Jones, the assignees delivered to Mrs. Foster and Mr. Jones a plant in the City of Norwalk for the production of electrical energy.

The power plant was located on Seminary Street on leased ground. There were delivered with the power plant all the poles, wires, lamps and other paraphernalia owned at that time by The Incandescent Light & Power

Company constituting an electrical distribution system through the City of Norwalk. The distribution system embracing private lighting and public lighting covered practically all the corporate limits. By "public lighting" I mean lighting the city streets and also incandescent lights for the city offices.

As nearly as I can remember, the purchase price for the property was paid by a check that was given to the assignees. The price paid was $13,500.00.

The property embraced by the deed by the assignees of The Incandescent Light & Power Company to Mrs. Foster and Mr. Jones, and delivered to them, was subsequently conveyed to The Northern Electric Company.

Plaintiff's Exhibit No. 7 to my best knowledge is the deed conveying the property acquired from the assignees by Mrs. Foster and Mr. Jones to The Northern Electric Company. That deed was delivered to The Northern Electric Company. The property, which Mrs. Foster and Mr. Jones acquired from the assignees of The Incandescent Light & Power Company, was delivered by them to The Northern Electric Company. I left Norwalk for a short time upon acquiring the property of The Incandescent Light & Power Company. The property was then in operation, the plant being used to generate electricity, which was distributed over the distribution system both for public lighting and for commercial lighting to private consumers.

One of the assignees, J. W. Foster, was then in charge of the plant and I told him to continue the operation in the same manner as he had been doing. I was absent from Norwalk about one month or possibly longer. I was living at Toledo at the time and went to Norwalk possibly twice a month. Upon formation of The Northern Electric Company, I retained the services of J. W. Foster to manage it for several months and he was in charge and took his directions from me. I controlled it.

Prior to the formation of The Northern Electric Company, I was approached by the manager who had charge of negotiations with the city with reference to a lighting contract with the City of Norwalk for public lighting. There was some discussion with the city with respect to a lighting contract through him.

After the property of The Incandescent Light & Power Company had been conveyed to The Northern Electric Company and after the latter company had obtained a contract from the City of Norwalk for a ten-year period, it proceeded to build a new plant on its own

property along the lines of The Wheeling & Lake Erie Railroad, about four blocks distant from the plant that was being operated under The Incandescent Light & Power Company. By "the ten-year contract" I mean a street lighting contract with the city. The Northern Electric Company acquired a new piece of real estate along The Wheeling & Lake Erie. The plant which it erected on this property consisted of a brick building about sixty by eighty feet; one hundred and twenty foot smokestacks, with a pond connected for the supply of water on compound condensing engines. At that time, a very new and up-to-date plant. The electrical machinery and appliances, switch-boards, etc., used by the former plant were put in the new plant. New compound condensing engines and new boilers were installed. As soon as the new plant was ready, The Northern Electric Company dismantled the old plant on Seminary Street, but during the period while the new plant was under construction it continued to operate the old plant on Seminary Street and distribute electric energy for public and private purposes in the City of Norwalk in the same mode and manner as was being done when Mrs. Foster and Mr. Jones acquired the property from the assignees.

The new plant was of double the capacity required for producing electrical energy for both the public and private needs of the City of Norwalk. I mean the power part of it, the engines, boilers and buildings. At that time, the distribution system in the city was sufficient to care for the needs of the city in its public capacity and for its citizens in their private capacities.

Q. As nearly as you can remember, Mr. Foster, what was the investment of The Northern Electric Company at that time in this new generating plant, I mean in dollars and cents?

Mr. Eversman:

We object to that on the ground it is not the best evidence, and for the further reason that it is irrelevant and immaterial.

A. Including the original purchase from the assignees, and the cost of the new plant, at the time we had the new plant in operation, we had expanded, as near as I can remember, between forty and fifty thousand dollars. When the new plant was put in operation, the then existing lines for the distribution of electrical energy in the city were connected with the new plant and disconnected from the old one.

Q. Prior to the construction of the new plant by The Northern Electric Company, did you have any con-

versations with officials of the City of Norwalk with reference to the construction of a new plant?

Mr. Eversman:

We object to that as being irrelevant and immaterial.

A. Undoubtedly, but I can't say specifically.

Q. You mean by that which ones? A. Which ones, yes.

Q. Did you or did you not acquaint city officials at that time with your intention to construct a new modern efficient plant for the generation of electrical energy?

Mr. Eversman:

We object to that on the ground it is entirely irrelevant and immaterial, and for the further reason it asks for a conclusion.

A. I did.

The new plant was constructed and put in operation as near as I can remember in November, 1895, late in the fall of the same year that the properties were acquired by The Northern Electric Company.

In 1897 The Northern Electric Company acquired some gas properties, and, on acquiring the gas pipe lines of The Northwestern Ohio Gas Company, it changed its name to The Northern Gas & Electric Company. To the best of my knowledge, Plaintiff's Exhibit No. 6 has attached to it a certified copy of an amendment of the articles of incorporation of The Northern Electric Company changing its name to The Northern Gas & Electric Company. I must have signed the certificate as secretary of The Northern Electric Company. I was in absolute charge of the company from the time I purchased The Incandescent Light & Power Company until The Northern Gas & Electric Company was disposed of in 1900. That year, I sold my stock in The Northern Gas & Electric Company. From the period of the incorporation of The Northern Electric Company until I sold my stock, including the change of name to The Northern Gas & Electric Company, the company continued the operation of the electrical generating plant and distribution system in the City of Norwalk, distributing electricity for street lighting and other public purposes and to private consumers. It was necessary from time to time to set new poles in the street and to make alterations in, and extensions to, existing lines in the street. My company made those changes and extensions. Those changes and extensions were made in accordance with the type and mode of construction, which were in existence generally when I went to Norwalk.

Q. You may state whether or not throughout the period of your operation of the properties, your company continued in the same mode of use of the streets of the City of Norwalk as you found when you went there?

Mr. Craig:

Object to that upon the grounds it is leading, incompetent, and irrelevant.

Mr. Eversman:

It is also a conclusion.

A. It did.

During the period from 1895 to 1900, my company supplied electrical energy to all private consumers, who desired it, under the rules of the company. Naturally I thought that throughout this five-year period, the plant and distribution system of the company was maintained in a modern and efficient operating condition. I am positive it was. To my knowledge, there was never any objection made by any official of the City of Norwalk during this five-year period to the manner in which my company used the streets.

About $2,500.00 per year was the net revenue derived by the company from the ten-year street lighting contract of 1895.

During the five-year period I was in Norwalk, the population of the city was slightly in excess of seven thousand people.

CROSS EXAMINATION

By Mr. Craig:

I am now living at 2230 Lawrence Avenue, Toledo, Ohio. I have been living in Toledo about half the time during the past five years and largely the other half of the time I have been engaged in business in Oklahoma.

I am quite certain I bid for the property that was sold by the assignees of The Incandescent Light & Power Company on February 12, 1895. As soon as I paid the $13,500.00, the purchase price of the plant, it was operated by Mayme C. Foster and George P. Jones, who was my partner in business at Findlay, Ohio, under the management of J. W. Foster, until the organization of The Northern Electric Company in May, 1895.

The contract for furnishing arc lights for street lighting in the City of Norwalk, as near as I can remember, was made in July, 1895, and the same property that had been operated by The Incandescent Light & Power Company and by Mrs. Foster and Mr. Jones was op-

erated by The Northern Electric Company until the generating plant was moved from Seminary Street to the new location on Water Street.

Defendant's Exhibit G appears to be the contract that was executed by The Northern Electric Company by George P. Jones, its president, and myself, its secretary, with the City of Norwalk under date of July 16, 1895, and it is the same contract to which I have referred. There was only one street lighting contract to my knowledge made by The Northern Electric Company with the City of Norwalk.

Defendant's Exhibit A is a photograph of the generating plant constructed by Northern Electric Company in 1895. The appearance and outlines of the building seem to be exactly like what I built myself in the summer and fall of 1895.

I may be mistaken when I say that I thought the new plant was in operation in November. It may not have commenced operation until January.

I operated the same line of poles and the same line of wires in the streets which were operated by Mr. Foster and Mr. Jones after I paid them $13,500. We used the same poles for both purposes, for lighting the streets, and, also, for commercial lighting, including incandescent lighting, carrying one line of wires that furnished alternating current and another line of wires that furnished direct current.

I made a promise to the council that in the event they would give me a ten-year contract I would build them a new, complete, up-to-date plant and whatever I put into the contract for street lighting I tried to comply with, in the construction of the building that is shown in Exhibit A, to the best of my ability.

Outside of the council chamber and the mayor's office, the city was to pay 15c per one thousand kilowatts for incandescent lighting at the city's headquarters and police station. All wires were carried on the same poles for all purposes.

After I had built the plant on Water Street and as soon as I purchased the pipe lines of The Northwestern Ohio Gas Company, I added a gas development plant in conjunction with the powerhouse, which I had previously built. I did not have the acquisition of the gas business in contemplation, when I bought the electrical property.

I remember that I testified as a witness in a quo warranto proceeding, in which the State of Ohio was plaintiff and the Ohio Electric Power Company was defendant, in relation to the same situation, and I believe

that I testified in that case that the entire expenditure for construction of generating plant shown in Exhibit A was about $25,000.00. That was the amount as nearly as I can recollect that I put into the improvement.

I remember where the city offices were located in the Whittlesey Building and I remember that the mayor had an office in that building; that the city clerk had an office, and that the police station was located in the same building. I believe the waterworks office was, also, located therein. If I remember correctly all those rooms and apartments were lighted with incandescent lights, and the wires that carried the current to those incandescent lights in the various offices and apartments came from the transmission wires on the pole lines that were purchased by Mrs. Foster and George P. Jones, and from the same generating plant. Only one row of poles carried them, and on those same poles were lines for incandescent lights and separate lines for street lighting.

I sold my stock in The Northern Gas & Electric Company to a man, whose name was Fuller, and after I left Norwalk the property was later acquired by The Cleveland & Southwestern Traction Company. I left Norwalk in the fall of 1899 and disposed of my stock in 1900. I left the property in the hands of a manager to look after the operation of it, and dictated the policy of the company until I sold my stock.

RE-DIRECT EXAMINATION

By Mr. Boxell:

When I testified in the quo warranto case as to the investment in the new plant by The Northern Electric Company, I meant approximately $25,000.00 and to explain the difference between the $40,000 and $50,000, which I testified had been invested, I will say we had put in $13,500.00 originally, and then about $25,000.00 for the new plant, and then I think we borrowed $5,000.00 from Gardiner's Bank in Norwalk.

Q. Now when you erected the new plant in 1895, did you do that solely upon the faith of having secured a ten-year lighting contract with the City of Norwalk?

Mr. Eversman:

We object upon the ground that it asks for a conclusion; wholly irrelevant and immaterial.

A. I did not.

Q. Did you or did you not have in mind that your

company from this new plant would serve private consumers throughout the City of Norwalk?

Mr. Eversman:

We object upon the ground the question is leading, and further that it is irrelevant and immaterial.

A. I did.

Q. What did you have in mind in addition to the ten-year lighting contract in erecting your new plant?

Mr. Eversman:

We object upon the ground that it calls for a conclusion and is irrelevant and immaterial.

A. At that time we had the same idea that in operating or building a public utility we had the same rights and privileges as any other manufacturing establishment. It was permanent so far as the rights of furnishing private lighting was concerned.

Mr. Eversman:

We ask that the answer be stricken upon the ground it is not responsive to the question.

Q. What was your purpose in organizing The Northern Electric Company under the laws of the State of Ohio, as a corporation under the laws of the State of Ohio?

Mr. Eversman:

We object to that question upon the ground the Articles of Incorporation are the best evidence as to what the purpose of the corporation was.

A. At that time, it was customary for all public utilities to organize under the laws of a state. It gave us certain rights and privileges.

Mr. Eversman:

We ask the answer be stricken upon the ground it is not responsive to the question.

Q. What rights and privileges in the nature of a franchise did you have in mind?

Mr. Eversman:

We object to that question for the reason that it asks for a legal conclusion and also is irrelevant and immaterial.

A. Continuous rights and privileges so far as private lighting was concerned.

Mr. Eversman:

We ask the answer be stricken because it is not responsive and is a statement of a legal conclusion.

Q. Do you mean by that the right and privilege of furnishing electricity to private consumers under the state laws of Ohio?

Mr. Eversman:

We object to that upon the ground the question is leading and for the further reason it asks for a legal conclusion, and for the further reason it is immaterial and irrelevant.

A. I did, at that time, because an electric light or power company, when once established, was considered to have the same rights and privileges of any gas plant which was permanent.

Mr. Eversman:

We ask that the answer be stricken for the reason that it is a statement of a legal conclusion and particularly, the last sentence there.

Q. Did you make any communication to the City of Norwalk with reference to your purposes or your intentions to organize The Northern Electric Company prior to its organization?

Mr. Eversman:

We object to that for the reason it is wholly immaterial and irrelevant.

A. Possibly.

Q. Do you recall whether or not you had any discussion with city officials relative to the organization of this new company prior to its organization?

Mr. Eversman:

We object for the reason that the question is irrelevant, immaterial.

A. No doubt I did.

Mr. Eversman:

We ask the answer be stricken out on the ground it is not responsive.

Q. With reference to the manner of use of city streets by companies organized under the laws of the State of Ohio, for the generation and distribution of electric energy to private consumers, at the time of forming The Northern Electric Company, what understanding, if any, did you have as to whether or not there had been any regulation by the City of Norwalk as to the manner in which its streets should be used?

Mr. Eversman:

We object to that; first, because it asks for a legal conclusion, and, second, because it is entirely irrelevant and immaterial.

A. If I remember correctly, all cities in which public utilities were operated at that time provided ordinances regulating how poles and wires should be placed, and I think there were such ordinances existing at the

time under which I purchased this Incandescent Light & Power Company.

Mr. Eversman:

We ask the answer be stricken because it is not responsive to the question, and for the further reason it states a legal conclusion. The answer is the statement of a legal conclusion and is not the best evidence of the ordinance of the city.

Mr. Craig:

And is based on an assumption.

Q. Mr. Foster, with reference to the distribution system which existed in the City of Norwalk during the time you were there and operated The Northern Electric Company, were there some lines, by that I mean pole lines, in the city which carried, for instance, only lines to private consumers, by that I mean as distinguished from poles which carried lines for public purposes and private both? A. The public lighting required a development of poles and lines which covered practically all the City of Norwalk inside of its corporate limits, and we used the same poles for carrying private lighting as well as public. Occasionally, we made extensions both for public and private lighting.

Q. And were there some extensions on some lines which did not carry both lines serving public lighting and private lighting? A. There possibly were.

Q. Mr. Foster, with reference to the ten-year lighting contract entered into in 1895, that is Exhibit G, what is your understanding and what was your understanding at the time with reference to whether or not at the expiration of that ten-year period your company was compelled to discontnue serving private consumers in Norwalk and to take down the poles and lines serving those private consumers?

Mr. Eversman:

We object to that for the reason it asks for a legal conclusion, and for the further reason the contract speaks for itself, and therefore, the question is irrelevant and immaterial.

A. No such idea ever entered my head. I surely wouldn't have built and put on the improvement that I did for merely the street contract lighting.

Mr. Eversman:

We ask that the last part of the answer be stricken for the reason that it is not responsive to the question and for the further reason it is irrelevant and immaterial.

Q. At the time of the construction by The Northern Electric Company of its new plant in 1895, you may state whether or not you would have gone to the expenditure in constructing the plant which you did had you possessed any idea that, upon the termination of the ten-year lighting contract, you would have had to discontinue service to private consumers?

Mr. Eversman:

Objection to the question on the ground it is wholly irrelevant and immaterial.

A. I surely would not.

Q. You may state whether or not you would have gone to any such expense solely upon the faith of a ten-year lighting contract with the City of Norwalk?

Mr. Eversman:

Object to the question on the ground it is irrelevant and immaterial.

A. I would not.

Thereupon the plaintiff called as a witness in its behalf

CLARENCE J. TAYLOR,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I am Clarence J. Taylor and reside at Lima, Ohio, and am engaged in the financing and insurance business. I have been engaged in the electric light and power business. I have been in utility work practically all my life, until 1924. From 1910 to 1913, I was connected with a company which had to do with the operation of the electric light and power plant and distribution system at Norwalk, Ohio, and then as advisor until 1916,

in fact I advised my successor there almost to 1920. From 1910 to 1913, I was local manager and from 1913 to 1916 I acted in an advisory capacity. Mr. Frederici was my successor there. From 1910 to 1916, I was familiar with what was being done by the operating company at Norwalk. It was The Cleveland & Southwestern Traction Company, which afterwards was known as The Cleveland, Southwestern & Columbus Railway Company.

In June or July, 1910, I went from the auditor's office at Cleveland and became power and light manager at Norwalk. At that time, the company had a single-phase line furnishing power for residence and commercial purposes and an arc lamp line, using the old Brush arc lamps, which furnished the street lighting. The The single-phase system consists of two wires with a positive and negative; while the three-phase system is a three-wire system, the third wire being considered a ground wire. Both the single-phase system and the three-phase system carried alternating current. The arc light system was a separate system, the voltage of which I do not remember, but it was a direct current line at that time.

When I went there, the alternating system was a single-phase system and we commenced to change over to the three-phase, the three-wire system, in 1911, and it went on through until 1916, when it was changed again. The change from the single-phase system to the three-phase system was accomplished by putting an additional wire to the pole line system. When I came there, the line was in very bad shape—the entire pole line; some of the wires were badly worn where they passed through the trees, and the entire system had to be overhauled, a number of new poles set, and wires added in some places to other wires, depending upon the condition of the wires already installed.

The officials of the city called our attention to the fact that we had to fix up our pole line and, also, our wires, due to the fact that they were getting arcs in some of the trees; some of the poles were in very bad condition, rotting at the ground and leaning, and it was dangerous for the public. Once or twice a year during every year while I was manager there, I received such communications from the city officials, generally the mayor or the clerk of the council. During that perod, there was Mayor Anderson and, I think, Mayor Martin served part of the time. I think there were three different mayors, there may have been only the two. While

I was there, an additional line was run to what is known as The Pressing Canning Company and The Norwalk Drilling Tool Company. There was a new line from the power plant just a short distance to The Himberger Lumber Company to take care of a motor installation.

The streets or public ways of the City of Norwalk were used for all those lines. We always had to get a permit from the mayor of the city any time we were going to change a pole or make any repair work, and we were never refused such permit upon application.

I would not know how much was spent by the operating companies I have named, during the period from 1910 to 1916, for maintenance, repairs, improvements and extensions of the plant and distribution system, but it must have run safely a minimum of between $20,000.00 and $25,000.00, I should say. During that time, the operating company maintained its plant and distribution system in substantially continuous operation, and electrical service was furnished during that period to any of the residents who applied for it.

I lived in Norwalk until April 1, 1924, but I did not give the situation as much of my time as I had prior to 1916. From 1916 to 1924, I know that the different operating companies continued to render substantially continuous service to those of its customers who desired that service, and during the entire period of my familiarity with this plant and distribution system, it was the only electric light and power plant and distribution system in the City of Norwalk, except a system installed by the city itself in about 1915. It was the only private company there. The generating plant of the private company was not in operation at all times. We received our power through a motor generator set from Elyria coming over a high tension transmission line and, whenever our load got heavy, we cut in the steam engine and drove our large generator or, in case of a storm between Elyria and Norwalk which interrupted the service on the high tension line, we cut in the steam engine and kept the boilers fired up at all times, with the boilers banked, requiring only a few minutes to start the steam generator. The high tension wires from Elyria were connected with this system prior to my going to Norwalk to take charge of it. The high tension line was built clear through to Norwalk, where we had a booster for the railway end, and the same transmission system handling the railway handled our power end at Norwalk. The railway, I think, after I left Norwalk was

wrecked between Oberlin and Norwalk. It was the same company at Elyria that furnished this power.

"Q. You may state, Mr. Taylor, while you were there in charge of this plant, and during the period when you were giving it close supervision, that is, the whole period from 1910 to 1916, whether or not the company complied with different orders, directions, or regulations, that were issued by the city or by the city officials with respect to the mode of the use of the street, the keeping up of the property, and so on? A. I think it did.

Mr. Craig:

Objection to that, if Your Honor please.

The Court:

I will admit it anyway. You can cross examine him on it. What is the objection?

Mr. Craig:

On the ground that it is too general, and would involve better evidence in the nature of record evidence and so on.

The Court:

I think we will let it stand. If you want to go into the detail of it, you can do it on cross examination.

Mr. Craig:

Exception."

CROSS EXAMINATION

By Mr. Craig:

Prior to my coming to Norwalk in 1910, I had been in the employ of The Cleveland & Southwestern Traction Company, which changed its name to The Cleveland, Southwestern & Columbus Railway Company and was the same corporation. It had a railway line extending from Oberlin to Norwalk and had acquired the generating plant and distribution system at Norwalk when I went there. I was local agent for the company at Norwalk. The company had a private right of way for its railway practically all of the way from Oberlin to Norwalk and the greater portion of its high tension line, over which electricity was transmitted occupied that right of way, except that the high tension line went around the intervening villages between Oberlin and Norwalk, rather than occupy the railroad right of way within the limits of the villages.

The booster service supplied for the operation of The Sandusky, Norwalk & Mansfield Electric Railway Company, of which I was receiver, received its electricity from the same generating plant, over the same

high tension transmission line. No part of the high tension transmission line was on the streets of Norwalk, except as it crossed streets.

The Cleveland, Southwestern & Columbus Railway Company was required to keep all wires along the streets for commercial service insulated and the majority of complaints, which I received from the city authorities, related to defects in wiring and rotted poles. When I went to Norwalk, both the poles and wires were old and I would only replace poles as they rotted off at the surface of the ground and as extensions were made.

The transmission line to the Pressing plant and The Norwalk Drilling Tool Company carried 2200 volts and was strung on new poles, except some of the poles which were already there, located on West Street. At that time, The Cleveland, Southwestern & Columbus Railway Company was supplying the City of Norwalk with arc lights under a contract, which expired August 31, 1915. Some time prior to 1915, there was talk in the City of Norwalk relative to the construction of a municipal electric light plant. The talk, in relation to the construction of a municipal plant did not spur my company to go ahead and make improvements, as these improvements were commenced in the fall of 1910. I would say that all the money for improvements was used on the distribution system within a period of more than two (2) years prior to the first of January, 1916.

I was appointed receiver of The Lake Erie & Bowling Green property in July, 1913, and I directed a number of new poles to be erected and constructed some of the three-phase system, before I went out of there as manager and Mr. Frederici came in. I remember that F. E. Myers, president of The Cleveland, Southwestern & Columbus Railway Company, and Mr. Wolfe came to Norwalk just after the passage of the ordinance for the issuance of bonds for construction of the municipal plant and had an open meeting with the council, and I remember they stated it was their purpose immediately to rehabilitate their system, so as to render more adequate service. There had been considerable complaint by the citizens of Norwalk on account of interruptions in the service. These complaints, I think, came more from our commercial users than resident users.

At that time, our current was coming in over the high tension line from the generating plant of The Cleveland, Southwestern & Columbus Railway Company at Elyria, except when operating at peak load. In 1912, I was appointed receiver of The Sandusky, Norwalk &

Mansfield Electric Railway Company by Judge Killits, and the receivership lasted until 1921 or 1922, and during that time this high tension line was furnishing power for the operation of that railway line, which extended from Norwalk south to Plymouth, a distance of 20 miles, with the addition of another railway line eight miles in length from Plymouth to Shelby, and a railway spur two miles in length. All the electricity for those lines came from the high tension line used by the Railway Company for its service as far as Norwalk, but when our heavy load came on we used the steam unit to take the load off the railway.

I do not remember the capacity of the generators and dynamos used in the generating plant at Norwalk, but they were of sufficient capacity for the requirements of the city, but not for the operation of the railway. The steam unit was for electric light purposes only. The street lighting system used direct current and the commercial system consisted of an alternating current, and both lines were on the same poles. In other words, a single line of poles in the streets carried both systems, the direct current system for the illumination of the streets at night and the alternating current the domestic or commercial service. We had only one pole line. I do not know the age of the poles, but some of them were very old and decayed.

In relation to the $20,000 to $25,000, which I stated in my direct examination were expended for repairs and improvements from 1910 to 1916, I just gave what I thought it amounted to, a minimum of from $20,000 to $25,000, it might have been $50,000. I do not know.

Records of these expenses were, of course, kept in the office.

When the municipal plant commenced business, in the early part of 1916, the other plant was not in want of repairs and we took on about a 40% greater load after that. At that time, there was talk about rebuilding the line in Norwalk, but it was never rebuilt while I was there.

After I became receiver of the two electric railways referred to, I gave three or four days a week to the Norwalk situation, that is to say, three or four days a week I put myself in position so if anything came up Mr. Frederici could come to me and I advised him just what to do. So long as I was in Norwalk, the same two generators were retained and in use. One was a small unit that handled the direct current for street lights. I do not know its capacity in kilowatts. The other was

a generating unit, but I do not know its capacity. I am not able to state what proportion of the $20,000.00 to $25,000.00 was expended for improvements and what proportion for repairs. I would not be able to do that. An improvement might be a maintenance charge but a new line would be a capital account. I do not know where to divide that, because you would have to see what amount was charged to capital account and what amount charged to operating expenses. I do not know how much of this estimated amount was charged to capital account.

I do not recall of any new line consisting of an extension, at the present moment, aside from the line to the Pressing plant, which was located about one mile and a quarter from the generating plant.

No part of the $20,000 to $25,000 was charged to the high tension line. The high tension transmission line was in charge of Superintendent Parkes.

In July, 1913, I was appointed receiver of The Bowling Green Light & Power Company and The Lake Erie, Bowling Green & Napoleon Railway Company and from that time on I was off the payroll of The Cleveland, Southwestern & Columbus Railway Company, and from July, 1913, to 1916 I spent half my time at Bowling Green. The extension to the Pressing plant, I am pretty sure, was made before January 1, 1916, in fact before 1915, and before the lighting contract with the city expired. The Pressing extension may have been made in the latter part of 1914.

The line to The Norwalk Drilling Tool Company was an offshoot from the Pressing line.

RE-DIRECT EXAMINATION

By Mr. Welles:

In the construction of the 2200-volt transmission line, some new poles were put in higher than the old ones. The complaints, which we received from the City of Norwalk, related to arcs in trees caused by the wearing off of the insulation on the wire, but our complaints from the citizens were in relation to an outage for four or five minutes when we received a general complaint from everyone. We proceeded to remedy the condition as to complaints received from the city and we tried to eliminate conditions complained of by the citizens.

Before I went to Norwalk as general manager, I had knowledge of the plant and distribution system owned by The Cleveland, Southwestern Railway Com-

pany. As assistant auditor of the company, the reports went through my hands before they went into the general report, and I had occasion to visit the city several times from 1903 to 1910. The poles, the kind of poles, the kind of wiring, the location of the poles, the streets, the heights of the cross-arms and poles were the same and continued to be used in the same way after 1910, as they had been during the previous years.

I think 1912 was the time when I took up with the city council of Norwalk the matter of changing from arc lamps to ornamental street and bracket lighting, and a change of the lighting contract from arc lamps to the new system. A. V. Andrews was our attorney at that time and we discussed a new lighting contract and franchise. I took that matter up on my own authority, without direction from any superior officer or board of directors of the corporation. The following week, the general manager called me to Cleveland and told me I was acting without authority, and I had to go to the city council and advise it that Mr. Snyder had asked me to withdraw my remarks pertaining to a new franchise contract.

After I ceased to be in charge at Norwalk, in 1913, I continued to be a stockholder. I had stock in the company from 1909 until they went through receivership, owning 100 shares of preferred and 400 shares of common.

Thereupon the plaintiff called as a witness in its behalf

RICHARD EARLE FREDERICI,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Lakewood, Ohio, and was railway agent for The Cleveland, Southwestern & Columbus Railway Company from August 31, 1910, to July 15, 1913, and

then I became manager of the electric light and power company and so continued until November 30, 1922. From 1913 to 1922, I was in charge as commercial manager of the power plant and distribution system of the company in Norwalk and was the successor of Clarence Taylor. During the period from 1910 to 1913, I had some familiarity with the power plant and electrical distribution system and knew that that system was handled through pole lines, wire lines, in the streets and alleys of the city. When I became manager of the plant, I had occasion to make repairs, replacements or extensions. I extended a new primary line on East Main Street from Linwood Avenue east to The Norwalk Auto Parts Company, just beyond the east corporation limits of Norwalk, a distance of about 1¾ miles. There was already a two-phase line a part of the way. I extended another line from Linwood Avenue to the end of the two-phase line and then about that far and built the entire three-phase line from there out to the Auto Parts Company located in the eastern part of the city.

I completed the three-phase primary extension that Mr. Taylor started for the Pressing Company, I think, in 1914. After the Norwalk Municipal Light Plant was completed and in operation, I extended a line on North West Street from Jefferson east to The Norwalk Drill & Tool Company, then north to the roundhouse of The Wheeling & Lake Erie Railway Company. That was a three-phase primary line for 2200 volts. This extension involved the use of new poles, new wires and new construction in general throughout and was put in the streets.

I was familiar with the use of the streets and alleys of Norwalk by the company, prior to 1913, and this manner of construction and use of the streets, in making these extensions, was according to the same manner of use as had been the case prior to 1913, and we probably used a little bit more judgment as far as safety was concerned, than was used prior to 1910. I always received a verbal or oral permit from the director of public service for these extensions. I acquainted him with the facts of what I wanted to do and got his permission to do it, and it was my practice to take it up with a director of public service. A. W. Carpenter was director of public service under Mayor Martin and C. L. French under Mayor Anderson. Mr. Martin, Mr. Venus and Mr. Anderson were mayors during that period of time. Mr. Martin was mayor when the municipal plant was dedicated in September, 1915.

When I took these matters up with the directors of public service, I obtained from them the approval for the doing of the work.

Until the installation of the municipal plant, we were serving both the city for public lighting and any private consumer throughout the city, wherever located, who applied for service; and after the installation of the municipal plant we continued to serve private consumers.

During the period of time when I was manager, the operation of the plant was continuous, and during this period there was a joint use of poles. The company, of which I was manager, used for its lines some city poles, and the city, on the other hand, for its lines, used some of The Cleveland & Southwestern poles. They used what were known as clearance contacts and quite a few poles were so used and the practice was general. When we made a contact of our lines with city poles, I called the matter to the attention of the director of public service, who approved it, and that was true throughout the period.

From 1910 to 1922, there was no other power plant and electrical distribution system in the City of Norwalk, other than that of The Cleveland Southwestern Company and the municipal plant and during that period we were always able to take care of the load by use of the generating plant of the Cleveland Southwestern, except at times. It required quite a load there about 1920. That plant always was in condition ready to render service. From 1910 to 1922, there were three electrical units for generating power, one 200-kilowatt and one 75-kilowatt and a small 110-volt direct current generator, the capacity of which I do not remember. Those generators remained during that period.

CROSS EXAMINATION

By Mr. Craig:

I came to Norwalk in 1910 and left in November, 1922. I know that since then the railway of the company has been dismantled and taken up and I think that occurred about 1924. I have been to Norwalk and have observed the right of way where the railway tracks used to be between Oberlin and Norwalk and the last time I saw it the high tension line from Oberlin to Norwalk, which transmitted electrical energy for the railway, as well as for the distribution system in Norwalk, was still there. That was about four years ago last July. I think

that some of the poles, to which the three-phase system is attached, have been changed, replaced with new ones. I can not say whether the transmission wires are still aloft there—they used to be. During all the time I acted as manager, the greater part of the current used for street lighting and commercial service came from that high tension line and was transmitted from the Elyria powerhouse. The high tension system consisted of a 23,000-volt line, if I remember correctly, which was 25 cycle. That was stepped down by a transformer at the Norwalk powerhouse to a voltage lower than 2300 and cut into a motor that was known as a motor generator set, and that generator regenerated current for the use of Norwalk at 2300 volts, 60 cycle. In a way, it was necessary to have the electricity from the high tension line in order to supply sufficient electricity for the load in Norwalk and, in a way, we could operate a plant of our own there. It was more a matter of cost of operation. The generators in the Norwalk plant did have capacity to carry the full load at all times, but I do not remember the kilowatt capacity, except that our generating equipment amounted to 275 kilowatts. I do not remember when the primary line from Linwood Avenue to The Norwalk Auto Parts Company was constructed. That was extended for the sole purpose of taking electricity to Norwalk Auto Parts plant and carried 2300 volts. While I lived there, the factory of The Norwalk Auto Parts Company burned down and that line was discontinued at that place, but was still kept in operation, because we had extended our primary on further east to East Norwalk for rural service and it was used for purposes inside the corporation as well.

Both the lines to the Pressing plant and to The Norwalk Auto Parts plant, which were located outside of the city, were constructed respectively at the instance of those companies. I recall a meeting held at the city council chamber of Norwalk, addressed by Frank Myers, of Ashland, and Mr. Wolf, of Cleveland, Myers then being president of The Cleveland, Southwestern & Columbus Railway Company, and I think that Wolf was then vice-president or a member of the board of directors. There may have been some discussion about asking a franchise from the city, but I do not recall it. As I recall the situation, Mr. Myers' proposition was that the city could save the bond issue for a plant, if the city would permit the company to rebuild one, and rebuild the lines in Norwalk to continue the operation there. I can not recall anything about a franchise, nor do I recall any talk about one.

I knew of the reconstruction of a single-phase line to a three-phase line, referred to by Mr. Taylor, in his testimony, and that conversion was effected by the addition of a single wire in the majority of cases and in some instances by changing all three wires. The single-phase line consisted of two wires and was an alternating line, and when it was converted into a three-phase, one wire was added to balance the load. The object was to make it possible to serve private consumers.

RE-DIRECT EXAMINATION

By Mr. Boxell:

When I said that the object of the change from single-phase to three-phase was to enable the company to serve private consumers, I did not mean that the company had not been able to serve private consumers before that time, but it was a betterment of service to private consumers.

In addition to the extensions, specifically referred to, while I was manager, the company also made miscellaneous repairs, replacements and betterments throughout its line. The generating plant in Norwalk was used to prepare the current for consumption by the City of Norwalk. We had what was known as a frequency changer, which was connected to a Noyes steam engine and we kept the fires banked under the boilers all the time. In case of a break down in the service between the Elyria powerhouse and our Norwalk station, due to storms, we put the steam plant into operation and operated the Norwalk plant entirely by steam, which was generated at the Norwalk powerhouse. We used the generating plant for the regenerating current coming over the high tension line. The high tension line was known as a 25-cycle, three-phase line, and we made use of the Norwalk generating plant in stepping that power down for use in the city through the operation of the frequency changer. The current was stepped down from 23,000 volts to 4400. The current thus stepped down drove a motor known as a frequency changer which was directly connected to this generator set.

I knew that the 1905 ten-year street lighting contract between the company and the city expired about September 1, 1915, but on that date the city did not at once begin lighting the streets and public places in Norwalk. My company continued to furnish street and public lighting for the city until January 1, 1916, at the same rate, at the request of Mr. Martin, the mayor, and

the director of public service who, I think, was A. W. Carpenter.

The plant of the Auto Parts Company burned down while I was manager and after the municipal plant had been in operation, but the line to the Auto Parts plant was continued to serve private consumers all along the way. G. Ray Craig and C. G. Taylor were two of these consumers.

Thereupon the plaintiff called as a witness in its behalf

JOHN F. KREIDER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I live at Sidney, Ohio, and have been employed by Ohio Electric Power Company since its organization in 1924. Prior to that time, I worked for another company, which it purchased. I am superintendent of construction work for Ohio Electric Power Company and as such I have superintendence of building extensions to lines and equipment of Ohio Electric Power Company. I am familiar with the lines of Ohio Electric Power Company in the City of Norwalk and have had occasion to be over those lines at numerous times and as late as yesterday.

In 1925, I made a blueprint of the system of Ohio Electric Power Company in Norwalk, which is Exhibit No. 48 and is a map of the distribution system of Ohio Electric Power Company at Norwalk and is a true copy of the original blueprint, which I made in 1925. So far as I know Exhibit No. 49 represents the distribution system of Ohio Electric Power Company as it is today, but I would not say positively that it does.

On Exhibit No. 50, there are lines of different colors and they represent the wires that have been taken down, and the distribution. I do not know whether they represent additions to the system.

As to Exhibit No. 49, it is a true copy of the original prepared by me in 1925, with the exception of the insertion of the heavy red marks; but Exhibit No. 50 is not a copy of my blueprint of 1925.

On Exhibit No. 48, the poles of the Ohio Electric Power Company are marked with one side colored, shaded. The telephone poles are indicated by a circle and the transformers by a triangle, and the phases of the different lines are indicated as marked on the exhibit, at the lower right-hand corner. The power plant is near a creek, which is at the rear of the plant and it is near Water Street. That was the location of the plant in 1925 and is its present location. In 1927, I superintended the work on these lines in the City of Norwalk, the most of the work being done on East Main Street. We were lowering the poles, cutting off the tops, and setting them deeper into the ground and running a new primary line wire. That was a pole line which Ohio Electric Power Company had acquired from the telephone company and the work involved was changes upon this existing pole line and the addition of some wires to it for Ohio Electric Power Company.

Mr. Webster was then director of public service for the City of Norwalk. While engaged in this job, he came out there.

"Q. You may state what conversation ensued between Mr. Webster and you upon any of these occasions, or any remarks which you heard Mr. Webster make to employees under your direction?

"Mr. Eversman:

Objection to that conversation, if Your Honor please, for the reason that it is entirely irrelevant and immaterial. Anything that Mr. Webster might say certainly would not be binding upon the city.

"The Court:

Do you claim he had the power to bind the city?

"Mr. Boxell:

We claim that Mr. Webster was director of public service, was an official of the city; and this goes to the point of showing the threats by the city to put the Ohio Electric Power Company out of the city, as alleged in the bill; and that will make it relevant and material.

"The Court:

It is not offered on the theory you thought it was, Mr. Eversman; it is offered on a different theory.

"Mr. Eversman:

What theory is it offered on?

"Mr. Boxell:

As I stated, it is offered to prove part of the allegations of our bill, that the city has been threatening to put the Ohio Electric Power Company out of the city by physical force.

"Mr. Eversman:

I have no objection to going into it, except I still insist, if Your Honor please, anything that the director of public service may have said is not binding upon the city.

"The Court:

He said he would connect it up with the city some way.

"Mr. Boxell:

In order to be perfectly frank and fair, I will say I don't know whether what the director of public service said was pursuant to any council ordinance, if that is what is meant; but certainly we are entitled to show what the properly constituted officials of the City of Norwalk did along those lines. They were the persons the Ohio Electric Power Company had to deal with; and it is certainly pertinent to our allegations.

"Mr. Welles:

This city must act by some individual. Here is the individual in direct charge of the streets of the city.

"The Court:

That is true.

"Mr. Welles:

And is given by the ordinance of 1924, if my recollection serves, considerable authority over public utilities of this character. If we cannot show that the city acted by this individual, how can we show the city acted at all?

"The Court:

Was he authorized by some ordinance to do something along this line?

"Mr. Welles:

We do not think he was authorized by any direct ordinance to oust the company by force, but he was placed in supervision of this kind of public utility; he was one of the executive officers; he was the executive officer in charge of the streets. If the city was going

to act by anybody, certainly this is the man the city would act by.

"The Court:

I think I will take the testimony under objection. I do not think it is relevant; it may be later. You may make your record on it.

"Mr. Eversman:

Exception.

"The Court:

I think it is not relevant; but it may afterwards turn out that it is. My notion is that the council is the only body that could make any threats that would amount to anything as to the ouster. Some official walking around would have to get the council's authority to back him, would he not?

"Mr. Welles:

I think it is within the general scope of the authority of the executive official in charge of the streets to eject persons who are wrongfully using the street.

"The Court:

As a matter of fact he never did it.

"Mr. Welles:

He set out ejecting us from the streets—this one or another in the same position.

"The Court:

If he had no authority to enjoin him, he certainly could not do that.

"Mr. Eversman:

That is precisely our objection, Your Honor.

(Question read.) A. He came out at different times, and he was very angry every time he came out.

"Mr. Eversman:

Objection to that and ask that that be stricken.

"The Court:

He is making up his record, Mr. Eversman, for the Circuit Court of Appeals."

"Q. Will you state what, if anything, Mr. Webster said to you on those occasions? A. He told us to get off the streets and stay off the streets; we had no right on there.

"Q. Will you state what Mr. Webster said to any of your employees who were under your direction within your hearing? A. Well he talked to all of us. We were usually all together. He talked so all of us could hear it.

"Q. Do you remember specifically or in substance any of the words which he used? A. His main idea

was to get us off the streets. He said 'Get off and stay off and do not come back again.'

"Q. At the time Mr. Webster gave these directions, these orders to you and your men to get off the streets and stay off, what were you and your men doing? A. Digging holes and setting poles.

"Q. Upon your lines which you said you were working upon? A. Yes, sir."

Yesterday, I observed poles which are used jointly by the city and the Ohio Electric Power Company. There were 70 poles belonging to the city, now being used by the Ohio Electric Power Company by contact of their lines with such poles, and 50 poles belonging to the Ohio Electric Power Company now being used by the city by contact of their lines with such poles. I was all over the system when I made the examination.

CROSS EXAMINATION

By Mr. Craig:

The general office of the Ohio Electric Power Company is at Sidney, Ohio, and its master plant is in that city. The colloquy with Mr. Webster which I have mentioned was had after litigation had commenced between the city and the company.

The poles that are used jointly by the Ohio Electric Power Company and the City of Norwalk with the exception of two cases, are where our lines parallel the city's lines. In order to conduce to safety, it is almost mandatory to use poles jointly where you have parallel lines with sagging wires and, independently of further considerations, the matter of safety necessitates the joint use of poles. The two exceptions are on East Main Street and East Walnut Street, where there is only one set of poles and that one set of poles is used jointly by both systems. Both systems are constructed on every street. There are no streets of any importance in Norwalk but what are supplied with the two rival lines. In some places in Norwalk, it is difficult to maintain one line, on account of the presence of trees.

The Old State Road is the east limit of the city and Main Street, referred to as an east and west street, crosses a street known as Whittlesey Avenue on the north and Benedict Avenue on the south. Main Street is practically lined with houses.

The power plant is an old brick building showing considerable age, one story high with a smoke stack, the dimensions of which I do not know. The Pressing plant

is located on West Street, at the point I have marked P on Exhibit 48.

The line, which I was engaged in building, when I was approached by Mr. Webster, is the line running to The Gallup-Ruffing Company's plant and to Wisconsin Food Products Company's plant. It was a 2200-volt line.

RE-DIRECT EXAMINATION

By Mr. Boxell:

It is perfectly safe in a city like Norwalk to have the city's distribution line on one side of the street and the Ohio Electric Power Company's line on the other if they are properly constructed. The joint use of poles is not made necessary in all instances by safety considerations. There are some lines in the City of Norwalk where there is a joint use of poles with only one set of poles bearing both lines.

Thereupon the plaintiff called as a witness in its behalf

DWIGHT E. TURKLE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Bad Axe, Michigan. I have been connected with Ohio Electric Power Company and went to Norwalk in April, 1925, from Ravenna, Ohio, where I had been one year. I was division manager of Ohio Electric Power Company at Norwalk and in charge of the company's business and operations there for three years. I left there in the spring of 1928. I acted ap-

proximately 30 days as manager for Mr. Emanuel. I became acquainted with the system, when I went to Norwalk, and, upon going there, had occasion from time to time to make repairs, replacements and betterments. I made them as I understood the use of the streets to be when I went there.

During the time I was local manager at Norwalk, the distribution system was in good, efficient operating condition and I made use of the generating plant, the boilers of which were kept heated at all times, so that we could get on the line within three minutes with our own generating plant. Any time there was repair work on the transmission line, the power plant was operated in its place. When we were not supplying our customers from the high transmission line, we were able to take care of all demands by the use of the local generating plant.

When I went to Norwalk in May, 1925, the company had approximately 300 customers and up until May, 1928, there was an increase to approximately 475 customers. In the three years I was at Norwalk, we spent approximately $18,000 to $20,000 on the distribution system and we served all private consumers whom we were able to reach. We were not able to reach all people, who desired service from our company, with our then existing line. If we had had permission, we could have extended and supplied further demands and there were further demands.

Plaintiff's Exhibits 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, and 66 are all letters on the letterhead of the City of Norwalk addressed to the Ohio Electric Power Company, Norwalk, Ohio, signed either by M. G. Irwin, Superintendent, W. P. Leighton, Director of Public Service, or B. P. Webster, Director of Public Service and Safety, and all were received by the Ohio Electric Power Company, Norwalk, on or about the dates indicated on them.

Plaintiff's Exhibit No. 62 is a copy of a letter to The Local Telephone Company, Norwalk, Ohio, signed The City of Norwalk, M. G. Irwin, Superintendent, and B. P. Webster, Director of Public Service; and I recognize the signatures of those gentlemen.

Plaintiff's Exhibit No. 65 is copy of letter by Ohio Electric Power Company to the Director of Public Service of the City of Norwalk, Ohio, and was written by our attorney, Mr. Pruner, and I signed the original and sent it to the addressee.

Thereupon, Plaintiff's Exhibits 51 to 66, all inclusive, were offered by plaintiff and objected to by Mr. Eversman on the ground that the exhibits are irrelevant and immaterial to the issues in this case; and thereupon a discussion ensued among counsel with the court. Thereupon, over the objection of the defendant, the exhibits were admitted and their relevancy to be passed on later, and an exception taken by defendant.

STATEMENT BY THE COURT:

"Yes, it is understood that all testimony along this line is going in over your objection and that you may make up your record later, if, as and when the case is carried up."

DIRECT EXAMINATION OF DWIGHT E. TURKLE
(continued)

By Mr. Boxell:

Plaintiff's Exhibits 54 and 55, refer to some cables and conduits installed by Ohio Electric Power Company, a 2½-inch iron conduit, and three No. 20 rubber covered wires starting on our poles at the intersection of Seminary and Hester Streets and going underground beneath the basement into our office for its use. That office is now occupied by Ohio Electric Power Company at Norwalk and was being installed as a new office in 1925. These underground cables or wires were installed about the time the Ohio Electric Power Company entered the city.

I learned of the passage by the city council of Norwalk of an ordinance July 1, 1924, regulating the manner in which telephone and electric light wires and poles should be maintained in the street. I learned of that ordinance through the receipt of the letter of July 31st from the City of Norwalk (Plaintiff's Exhibit 54). After receiving the letter, the cable was disconnected from the secondary line and approval was asked of Mr. Leighton, director of public service, to leave it intact, and later the cable was removed.

Plaintiff's Exhibit No. 56 was in response to my application to leave this construction intact.

The second paragraph of Plaintiff's Exhibit No. 58 also refers to this conduit and cable construction.

The conduit is still in place, but the cables and wires were disconnected.

There is no reply to Plaintiff's Exhibit No. 65.

Exhibit No. 64 is the letter referred to in my letter of September 26, 1927, which is Exhibit No. 65. That correspondence referred to the rebuilding of our three-phase primary line from the power plant on Water Street to Main Street, thence east to The New York Central tracks and The Wheeling & Lake Erie tracks. We replaced the poles by cutting them off at the ground line, reset them, and changed the primary conductors to heavier and new copper. This work came under the head of "Maintenance"; not new construction. There was no extension of the lines.

There was no response to our letter, Exhibit No. 65, but the director of public service, Mr. Webster, personally attempted to stop us, after our letter of September 26th was received.

In carrying out the work, in which we were then engaged, we attempted to conform with the specifications of the ordinance of July 1, 1924, and our policy was to abide by the city's ordinances and we did so.

Plaintiff's Exhibit No. 60, a letter to the Power Company, dated November 19, 1925, by Leighton, director of public service, refers to a secondary line on Elm Street from Norwood to Maple Street, and advised us the city would not require us to change any conditions on that line then as it had been put in fairly safe condition.

It was agreed by counsel that the date of the ordinance, referred to in Exhibit 61, as July 1, 1925, is a typographical error and that the writer intended to refer to the ordinance of July 1, 1924.

The directions contained in Plaintiff's Exhibits 61-66, all inclusive, to remove certain sections of lines, were followed and practically all such sections of lines were removed. The service man charged with the work was A. V. Greenfelder. He did the work.

When I went to Norwalk, poles of Ohio Electric Power Company were used for the attachment of lines belonging to the city's distribution system at different places.

Thereupon, Mr. Eversman, for the defendant, stated that there would be no dispute as to the joint use testimony of the witness in relation to 50 of the company's poles and 70 of the city's poles as heretofore testified to by one of plaintiff's witnesses and that such use existed during the time Mr. Turkle was in Norwalk, but that there would be some explanation as to the manner of the use.

The witness, Dwight E. Turkle, further testified:

In 1928, there was a severe sleet storm in Norwalk and the service was in very bad shape all over town, although we took care of our work all night long and never had the service off in the business section, nor was it off the factories on the following morning.

I heard the testimony of Mr. Fauver on the stand a few minutes ago. It was brought to my attention that some arrangement between counsel for the City of Norwalk and counsel for Ohio Electric Power Company had been made to preserve the status quo until the quo warranto suit in the Court of Appeals had been determined, and that the city would not attempt by physical means to interfere with the service of the Power Company, and that the company would not attempt to make extensions of lines. The Ohio Electric Power Company observed that arrangement.

I was manager of the Ohio Electric Power Company in October, 1927, and I recall that in the latter part of 1927 Mr. Greenfelder reported to me that there was some disturbance with reference to the lines of the Ohio Electric Power Company on West Main Street. I went there shortly after it was reported and got in touch with our attorney, Mr. Pruner. I found three transformers on the ground. Several poles had been removed and the 2300-volt wires were practically on the ground at certain points making quite a severe hazard.

I was out there about 7:30 in the morning and saw two employees of the city light department still working. I did not know either of them. I did not observe any vehicle belonging to the city. These lines were down on the south side of West Main Street starting at the church and extending in a westerly direction approximately 1800 to 2000 feet. These lines and transformers belonged to Ohio Electric Power Company. These lines were re-established under my direction by noon of that day.

CROSS EXAMINATION

By Mr. Craig:

When I came to Norwalk in 1925, Mr. Victor Emanuel was operating the Ohio Electric Power Company system of electricity and the transmission line from Elyria served both towns, Norwalk and Oberlin. Elyria is approximately 9 miles east of Oberlin. The high tension line was on the right of way of the old C. S. & C. The electrical current, which supplied Oberlin, came over the high tension line of the Railway Company.

Exhibit No. 48 is correct in a general way as to the location of the electric lines in Norwalk, as of the time I was there.

The poles which were cut down on West Main Street were located from Church Street to Pleasant Street. The majority of the poles had been cut off at the ground and had fallen. The wires were practically on the ground and in most instances were still energized. I would not say that they were on the ground but that in places they were within two feet of the ground. Seven or eight poles had been sawed off. I don't recall seeing Judge Suhr and Mr. Craig there that morning, but I know there was a sudden cessation of sawing.

I do not mean to say that all the poles between Church and Pleasant Streets were disturbed or cut, but 7 or 8 poles were removed. That line on the south side of Main Street west of Whittlesey Avenue carried telephone lines and those lines had been removed from the south side of Main Street between Whittlesey Avenue and Church Street and put in conduits. Some of the poles that were cut sustained the span of wires of the trolley of The Lake Shore Electric Railway Company. Those poles were being used by at least three different parties. I do not know whether the telephone company still had any wires on those poles. I do not know whether they had put in conduits from Church Street west to Pleasant Street. I do not recall receiving a letter from the telephone company addressed to Ohio Electric Power Company requiring it to remove its wires from the telephone company's poles between Church Street and Pleasant Street. I am not certain whether the poles, which were cut down, sustaining the wires of Ohio Electric Power Company, were actually owned by Northern Ohio Telephone Company. Within the space of 1800 to 2000 feet approximately half of those poles were our own poles. So far as the use of the line on the south side of West Main Street was concerned, it was a party line in part, but we maintained our lines on part of the telephone company's lines for 20 years.

There were two new city employees right in front of Don Young's home which is on Main Street just west of Church Street. When I saw them, they were putting a transformer up on the curb, which had been removed from one of the poles. In a general way, I was familiar with the so-called party poles and those poles were used jointly in some instances where a city line ran on one side and the Ohio Electric Power Company's lines ran

alongside of it, and I know there would be instances of crossing from the city line to the opposite side of the street, where there would be a contact with our pole line. I would not say how many there were of such instances, but there probably were 25 or 30 of such contacts. Usually in the case of parallel lines, the city's distribution was on the top of the pole, the upper crossarm, and it depended upon the construction whether the primary or secondary would be beneath it on the same pole. In some instances, the lines were on the same line of poles; in other instances the pole line was on each side of the street. Usually, there was one pole line with both lines on the same pole. That is what we call a joint construction.

Of the $18,000 or $20,000 expended for repairs, replacements and betterments, I could not classify offhand the proportions used for repairs, for replacements and for betterments.

The entire classification is practically what we term maintenance in our accounting system. It all comes under "Maintenance." There is a difference between repairs and replacements. Many times in replacements, such as the construction of East Main Street—there was considerable money put in that line in increasing its capacity. If we removed the wires and exchanged them for heavier, we called it a replacement. The term betterment applied to maintenance and by betterments I mean improving the service. If we took down an old line and replaced it with a new line, it would be denominated a betterment and I so treated the matters, when I said that for these three purposes we had expended $18,000 or $20,000, but I can not say how much was used for each one of those three purposes. They were not all carried as maintenance charges, but a certain amount would be carried to capital investment to improve the capacity of the line. I could not say how much of it was capital. The greater part of the expenditure was for maintenance.

During the time I was at Norwalk, I had control of the property there and, also, the property of the company outside the city in that vicinity. The outside property was from Norwalk east following the transmission line to Kipton, where we had a distribution system for private customers. We, also, had one at Birmingham. When I left there, both the Kipton and Birmingham lines were being maintained. We had a substation at Wakeman off the high tension line which was used to supply electricity for the Railway Company. We had

another station in the rural district and some rural lines outside of Norwalk. The 475 customers were inside the city.

Defendant's Exhibit A is the generating plant in Norwalk and was there during the three years of my activity. Defendant's Exhibit A shows the condition of the plant, when I left the service of the company at Norwalk. It is a fair representation of the plant at that time, but I don't know whether the roof was in that bad shape all of the time I was there.

The testimony in the immediately following paragraph was taken over the objection of the plaintiff that Mr. Turkle's action was not the action of the company, that if it had been it would have no bearing upon any issues in the case because the company could have a perpetual franchise, or any number of them, and at the same time in an effort to avoid a controversy could try to work out a solution by acts of the citizens. An exception was taken.

I am the D. E. Turkle mentioned in Defendant's Exhibit B. I circulated the petition to bring initiative action about. I don't recall just the wording of it. I had something to do with the circulation of the petition at the instance of my superiors, Ohio Electric Power Company. I was instructed by the company to take care of it.

I am now working for a subsidiary of Ohio Electric Power Company. The general company is The National Electric Power Company located at New York. Our company is being operated out of the Chicago office. Mr. Emanuel was connected with that company at one time. Mr. Insull is an officer of the company. The company, which has its headquarters in Chicago, is The Middle West Utilities Company and Samuel Insull is president. The National Electric Power Company is still intact in New York.

I was at Norwalk and had charge of the rebuilding of the line to The Gallup-Ruffing Company. I was not present when Mr. Webster appeared, but was just arriving at the scene, possibly 100 feet away, when Mr. Webster left. I heard no conversation. No force was being used and no overt act of any kind done, but just a little feeling.

"Mr. Craig:

In connection with our cross examination we tender in evidence Exhibits A and B.

"The Court:

It will go in over the objection.

"Mr. Welles:

There is no objection to A—the picture. We ask an exception to the admission of Exhibit B."

RE-DIRECT EXAMINATION

By Mr. Boxell:

When I went to Norwalk, the service on the electric line, which ran along the course of the high tension transmission line from Oberlin into Norwalk, had been abandoned and the railway was no longer in operation, but the transmission line had been in continuous operation; the traction service had been eliminated and a portion of the tracks removed. The high power transmission line was used continuously for the main purpose of bringing current in to serve the Ohio Electric Power Company's distribution system in Norwalk and it incidentally served some smaller stations along the line between Norwalk and Oberlin.

The holes in the roof of the building, shown on Exhibit A, are in the end of the building used for a coal bin. The generators are located in the south part of the building, which has a good roof on it.

Thereupon the plaintiff called as a witness in its behalf

L. B. FAUVER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I am an attorney-at-law and reside at Elyria, Ohio, and have been for a number of years attorney for Ohio Electric Power Company at Norwalk. I have been their general counsel and I was in the quo warranto proceed-

ing associated with Mr. Pruner, of Norwalk, when the rights of that company were tested. After that case had been commenced, I had a conversation with Mr. Craig in his office, at which I believe Mr. Pruner was present, either in the late fall of 1926 or early in 1927. I stated to Mr. Craig that we were hearing continual rumors that certain city officials were proposing to throw our lines off the streets, and we felt concerned about the protection of our property in Norwalk. I said to him that if there was any danger of proceedings of that character on the part of the city, we proposed to take out an injunction as soon as possible. The matter was discussed at length, and I suggested that the whole matter, as far as these lines were concerned, should be held in status quo until the case was finally determined, and Mr. Craig said that the time ought to be limited to the determination of the case in the Court of Appeals. Mr. Pruner joined in the conversation and I remember Mr. Craig said an injunction case would raise substantially the same issues that were raised in the quo warranto case and would occasion a multiplicity of law suits. We finally agreed that our lines would not be disturbed, and that we should not undertake to extend our lines during the time the Court of Appeals had the matter in its jurisdiction. Later on, while taking testimony, and I am not sure where the conversation occurred, there was some letters, but I do not recall their contents—I think from the telephone company—and the matter came up again. I remember we had a letter, in which we thought there was another threat to take down our lines and a similar conversation occurred, but I do not recall who took part in that, except Mr. Craig was there and Mr. Martin probably was there, and Mr. Pruner. I am not sure whether Judge Suhr was there. Substantially the same conversation occurred. I believe it was understood that the status quo of the lines should be maintained and that we should not undertake to extend our lines in any manner whatever, and that the city would not undertake to interfere with the lines. I think that it was Mr. Craig's suggestion that the company should not extend its lines in consideration of the city not disturbing its existing lines for the time being, but I am not sure. Later, in October, 1927, I was informed early in the morning that there was some disturbance with our lines. In the course of an hour—I should say before 9:00 o'clock—I was able to get Mr. Craig on the telephone and said to him that the city, in violation of the agreement which he had made with us, had torn down part of our lines on

West Main Street, I believe he said he had heard of the matter and possibly had been down there or he had seen some of the city officials and had put a stop to the whole situation. He, also, stated positively that this interference with our lines was either against his direct orders or without his knowledge.

CROSS EXAMINATION

By Mr. Craig:

"Q. Mr. Fauver, in order to refresh your recollection, I will ask you if the agreement which you referred to did not take place over in the Common Pleas Courtroom at Norwalk, and if this was not it in substance: We had been taking depositions in the quo warranto case with Mr. Bracey present with Judge Suhr also there, and Mr. E. G. Martin, myself, yourself, Mr. Pruner, and one or more witnesses; and if you did not take a letter out of your pocket and present it to Judge Suhr and say to Judge Suhr 'What are you trying to do with us now?'; and Judge Suhr answered you by saying, 'Why, this is something I do not know anything about; this is a letter from the Telephone Company; and upon the letter being read, it contained in substance this language: To the Ohio Electric Power Company: Having completed our conduits and being under contract with the city to take down our poles, and your wires being thereon—or that in substance—you are now requested to take down your poles.' Then did you not say 'Cannot we make an agreement so far as the city is concerned so that there will be no interference?' And did not Judge Suhr say 'I cannot bind the Telephone Company, but, so far as the city is concerned, we will not cause any disturbance.' And then did you not ask that that agreement be kept in force until the quo warranto case had finally been determined? And did I not say then, 'Until it has been determined in the Court of Appeals.' And then did you not say that; and then did I not say to Judge Suhr, 'While I cannot bind the city by my agreement, I think you better ask them not to extend their lines in the meantime. And then was it not agreed among all parties that that line of conduct should be carried out and preserved? A. Your statement is partly correct and partly wrong.

"Q. In what respect is it wrong? A. It is wrong because it does not incorporate a statement that the arrangement theretofore made, by which the lines were to be held in status quo, should not be carried on in the future; in other words, the statement was clearly made

at the time of this later transaction; and I have forgotten the terms of the letter—if I saw it I would know—the statement was clearly made by myself, referring back to the agreement we had made some weeks or months before with you—we had an agreement that the lines were not to be interfered with.

"Q. Was Mr. E. G. Martin present in my office at that time? A. I don't recall, Mr. Craig, I don't know.

"Q. Do you recall whether Judge Suhr was present? A. I would not recall. You will recall that we had a great many meetings during the time.

"Q. What I stated—did that not substantially take place over in the courtroom? A. There was a letter presented over there; its contents I do not exactly recall.

"The Court:

Is that where you were taking testimony in this quo warranto suit?

"Mr. Craig:

Yes, Your Honor.

"The Witness:

There was undoubtedly conversation about that later.

"Q. Well, if there was any agreement made with me with reference to that, do you know of anything I did not to carry out the agreement? A. Absolutely nothing. I think you were very fair.

"Q. You say you called me about nine o'clock in the morning? A. I called you earlier than that.

"Q. I will ask you if you are not mistaken about that. A. No, sir, I am not.

"Q. And if this did not occur: You called me about two o'clock in the afternoon, from Elyria, saying you had word from Mr. Pruner that someone had been cutting down some poles; and did I not tell you Judge Suhr and I had personally gone out that morning about seven o'clock; and that we had gone out and personally stopped the cutting down of poles pursuant to our agreement; and that I had been trying ever since to get in touch with the superintendent of light, Mr. Irvin; and then did I not further tell you that I had seen the mayor, and that I had seen the director of public service, and both of them disclaimed having any knowledge of it; and that I said to them if they were in any way responsible for it I would get out of the case. Do you remember my telling you that; and did not that conversation occur about two o'clock in the afternoon? A. I would not say about the time.

"Q. Did I not tell you that Mr. Pruner had called

Judge Suhr and me along about seven o'clock, and that we left our respective homes and went out to a place where they claim these poles were being cut down, and that we had stopped them; and that since then, Mr. Pruner had filed a petition in the Common Pleas Court for an injunction? A. Shall I now answer the question?

"Q. Yes, sir, is that not correct? A. No, sir, it is not correct, in this particular: That I feel sure that I talked with you early in the morning. I think that is not important, however. You did not tell me over the 'phone or any other time that the mayor or the service director disclaimed responsibility for what we considered an outrageous proceeding.

"Q. Did I not tell you I had gone to see them and told them I was going to withdraw from the case if I found the city were not living up to their agreement? A. I think you said something about withdrawing from the case.

"Q. If they were not living up to their agreement? A. I think you said to me you would withdraw from the case if the city insisted on going ahead—something of that kind—I don't recall your statement exactly.

"Q. Well, afterwards, you and I had a talk about it? A. I think we joked about it quite a few times.

"Q. And after that did I not tell you that the superintendent of light was trying to justify himself on the ground that these were telephone poles belonging to the Northern Ohio Telephone Company, the one that had written this letter exhibit, in the courtroom? A. No, sir, I don't think you ever told me anything of that kind; I never heard that suggestion in my life.

"Q. You say I did not tell you that? A. Yes, I would, because I think it would have made an impression upon my mind if you had. There was a controversy if you will allow me to make the suggestion—

"Q. If I did not tell you that, what was it the Telephone Company was brought into the case? A. They were not brought into the case.

"The Court:

You mean they were party defendants to this injunction suit?

"Mr. Craig:

Yes.

"The Witness:

Oh, you meant that case.

"Q. Yes. A. They claimed some poles on the east side of town that the Ohio Electric Power Company, I

think, claimed to own. I never knew that controversy extended to poles on West Main Street; never heard it did.

"Q. Do you know where these poles were cut down? A. They were on the south side of West Main Street. I think there perhaps were seven or eight or ten poles.

"Q. Do you know what became of the letter from the Telephone Company that you had in the court room? A. I do not. I may have it in my files. I don't know.

"Mr. Craig:

That is all.

"Mr. Welles:

That is all."

Thereupon the plaintiff called as a witness in its behalf

W. R. PRUNER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at Norwalk and for a number of years have been practicing law there. I have been attorney for the Ohio Electric Power Company four or five years. I have knowledge of the incidents testified to here regarding the cutting down of poles, on which were wires of the Ohio Electric Power Company, by city employees in October, 1927. I live on West Main Street and when I came down town that morning I noticed some poles had been cut and some wires let down between Church Street and Pleasant Street. Eight or ten poles were cut off, the wires were hanging low toward the ground. It was about 8 o'clock and I saw some men—city employees—

along the line. I do not recall whether they were working at that time. It seems to me that there was a city truck there too. I do not recall that I saw any city officials.

I remember calling on C. Ray Craig at his office in company with Earl Boxell January 3, 1930. There was some conversation on the subject of the injunction granted by the state court. Mr. Boxell and I went over to Mr. Craig's office and Mr. Boxell was introduced to Mr. Craig. Mr. Boxell proceeded to state that he was representing the Equitable Trust Company; that on behalf of that company an action had been started in this court; that while an injunction proceeding was then pending in the Common Pleas Court of Huron County it would not be effective, in view of the fact that the quo warranto case had been decided against the Ohio Electric Power Company by the Supreme Court of Ohio, and Mr. Boxell asked Mr. Craig if he would agree to continue the arrangements, which we had made, that the status quo of the property would continue during the litigation which was then pending in this court. Mr. Craig said the city had granted all the favors that it would grant, and that he proposed to take action to get the Ohio Electric Power Company off the streets of the city. That was the substance of the conversation.

I think Mr. Craig put it that "we" would take action to put "you off the streets of the city, put the company off the streets of the city." Mr. Craig declined to enter into any arrangements whereby the state court's injunction was to remain in effect without contest pending the outcome of this suit in the United States court.

CROSS EXAMINATION

By Mr. Craig:

"Q. Mr. Pruner, do you recall any other part of the conversation? Was there any other conversation occurred there than you have related? A. Yes, sir, there was some further talk there.

"Q. Do you recall it? A. Yes, sir, some of it. Maybe I do not recall all of it.

"Q. Let us see how nearly you and I can get together. Mr. Boxell came into the office with you? A. Yes, sir.

"Q. Do you remember what was first said? A. I introduced you to him.

"Q. You introduced him as Mr. Boxwell, did you not? A. I did.

"Q. He corrected you and told you how his name was spelled? A. Yes, sir.

"Q. And then he told me he was from the firm of Tracy, Chapman & Welles of Toledo, did he not? A. Yes, sir.

"Q. And that that day he had filed a bill of complaint in the United States District Court for the Northern District of Ohio against the City of Norwalk on behalf of the Equitable Trust Company of New York? A. That was stated at that time. I think he stated it.

"Q. Do you remember what next occurred, what next was said? A. Well, I don't know what next was said; but I remember—

"Q. Did I not ask him then what the Equitable Trust Company had to do with it? A. You asked him that in the course of the talk.

"Q. Did he not then say that the Equitable Trust Company was the assignee of the Seaboard National Bank of New York? A. I don't recall that. I thought in that connection he stated that his client was trustee for the bondholders of the property that was involved in Norwalk.

"Q. And then did I not call his attention to the fact that the mortgage that was of record did not appear to have been assigned to anyone, but stood in the name of the Seaboard National Bank of New York as trustee? A. I don't recall that.

"Q. Then did he not tell me that the Seaboard National Bank had been merged with the Equitable Trust Company? A. That statement may have been made.

"Q. And then did he not say that he had called to see whether or not he could get a stipulation whereby the City of Norwalk would agree to let the injunction in the case that had been commenced by the Ohio Electric Power Company against the City of Norwalk and the Northern Ohio Telephone Company and others stand until the litigation pending in this court was determined? A. I think that is about the substance of his request.

"Q. And then did I not—do you remember what I said next, and what was next said? A. You said that, I think about that time, that you would not; the Ohio Electric Power Company had all the favors that they would get and you would not grant any more favors.

"Q. Before that, did I not say I was not an attorney in the case pending in the state court, that is, the case of the Ohio Electric Power Company against the

City of Norwalk and the Northern Ohio Telephone Company, and that, therefore, I had no authority to enter into any stipulations? A. I do not remember it that way, Mr. Craig.

"Q. And did I not expressly say that Mr. Bracey had just come in as the new city solicitor, having succeeded Judge Suhr; and that I would not want to take up the matter of any stipulations without the presence of Mr. Bracey? Did I not say that in substance? A. I don't recall just that part about Mr. Bracey. But you did say in the course of the talk, as I understood you, that you were not engaged as counsel in this suit that Mr. Boxell was talking to you about. I do not recall you said anything about the old injunction suit that was then pending, because he came to you, of course, as an attorney representing the city; that is the reason he was there.

Q. Did I not tell him I did not represent the city in that case, and that Judge Suhr, having just gone out of office the first of the year, and Mr. Bracey having succeeded him, I had no authority to enter into any stipulations without taking the matter up with Mr. Bracey; and then did I not say that I would also have to see Mr. Martin who had been of counsel in the quo warranto case; and did not Mr. Boxell say that you had just been to Mr. Martin's office and Mr. Martin was not there? A. That might have been said.

"Q. And then did I not inquire of him whether or not any preliminary injunction had been granted by this court, that is, the federal court? A. I think you did.

"Q. And did he not say that no preliminary injunction had been granted, but he expected to apply for one? A. Yes, sir, that was stated in the talk.

"Q. And then did I not ask him on what ground he expected to apply? A. I don't remember.

"Q. And did he not answer that by saying, 'Because you fellows violated your agreement you had with the Ohio Electric Company'? A. I don't think that was stated, Mr. Craig.

Q. Are you sure of that—and then did I not say to you 'You mean to imply that I violated my agreement with the city'? and he said 'No, not exactly you, but there was a violation of the agreement.' And then do you not remember I said that you knew I had gone out with Judge Suhr, or had been advised I had gone out with Judge Suhr and stopped them cutting down the poles which it subsequently developed belonged to the Telephone Company? A. There was nothing in the con-

versation, Mr. Craig, that inferred that you had violated your agreement. I will say that positively.

"Q. If that is my recollection, then, one or the other of us is mistaken? A. Yes, sir, I think one of us must be wrong.

"Q. Do you not remember about the Telephone Company being mentioned? A. I don't think it was in that talk at all, Mr. Craig.

"Q. Did I not say you had made the Telephone Company a party defendant in the case that was pending in the state court? A. We got into nothing of that kind, because when Mr. Boxell stated what he was trying to do—that he wanted to get an agreement instead of securing a temporary injunction, and hold the matter in status quo—that was the term that was used from the start to the end, as far as I know—you said quite emphatically that no more favors would be given to the Ohio Electric Power Company.

"Q. Did I not say I had been tired of granting favors because I thought I had been imposed upon by someone connected with the Ohio Electric Company? A. No, sir.

"Q. Did you say, 'Mr. Craig, I don't have anything to do with this litigation now pending in Toledo'? And did I not say, 'No, Mr. Pruner, I don't think you had; and neither do I think Lee Fauver was connected with it'? A. No, that was not the way it came about at all.

"Q. Did I not say, 'I am not making any implication against you'? A. You said that.

"Q. Then did I not say that King Fauver had called me up shortly after the Supreme Court of Ohio had affirmed the judgment in the case that had been taken on error from the Circuit Court and told me that the Ohio Electric Power Company intended to go to the Supreme Court of the United States direct from the Supreme Court of Ohio; and that we had been trying to be decent and had waited when we might have asked to have the mandate enforced; and that the time would expire tomorrow night for them to go to the Supreme Court of the United States. Do you not remember that? A. Not that. I think the question of the expiration of the time within which to effect the appeal was discussed; but that is the first time I heard of that conversation between you and Mr. Fauver.

"Q. Did I not tell that to him? A. No, sir.

"Q. Or to you? A. No, sir. I don't think so.

"Q. Would you swear positively it was not mentioned? A. Yes, sir, I will say it was not mentioned.

"Q. By me in that conversation? A. Yes, sir.

"Q. Do you remember what next was said? A. I have not got the sequence in my mind. I have not spent much time on it.

"Q. Did I not tell him I could not agree to anything because— Did I not ask him if he had a copy of the bill of complaint with him; and he said he did not have, but a copy would be mailed here? A. Yes, sir, I think you asked for a copy or that one be sent to you.

"Q. Did I not tell him I did not know—I would have to call Mr. Bracey's attention to it; also some members of the council; that I did not know whether I would be employed to represent the city in this case? A. Yes, sir, I think you said that.

"Q. And that I would want time; and he asked me when I could give it my time? A. I don't know that.

"Q. Did I not say, 'I have to go to Cleveland tomorrow'? Do you remember what day of the week this was? A. The third day of January—no—I cannot recall what day of the week it was.

"Q. It was Friday night, was it not? A. I don't remember.

"Q. Did I not tell him I would have to be away all the next day? A. I don't remember that.

"Q. And did I not tell him I would have to be away from Norwalk all the next week? A. I don't know. You might have said that.

"Q. And did you not say, 'Mr. Craig has to go to Columbus, I know, Monday, because he is a member of the board of examiners, to examine applicants for admission to the bar before the Supreme Court'? A. That might have been said.

"Q. Do you not remember that that was discussed? A. I think it was.

"Q. And then do you not remember I said that I could not give the matter any of my attention until the week after the week following; but before leaving I would try to see the city solicitor and tell him, and tell Mr. Bracey; and that whether I would be employed to represent the city or not in the case in the federal court, I did not know? A. Well I know there was talk that you did not know whether you would be employed in this particular case. You could not say at that time. I don't know what the language was.

"Q. And then did I not say that the city had been trying to be decent: and that we had withheld trying to enforce the mandate sent down by the Supreme Court to give Fauver & Fauver an opportunity to go to the

United States Supreme Court; and that Mr. King Fauver had telephoned me and asked me whether I wanted a supersedeas bond filed or not to hold the mandate in abeyance? A. I will not say that was not said.

"Q. And then I made the remark, did I not, that it looked now as if we had been imposed upon because the Ohio Electric Power Company had evidently procured the Equitable Trust Company to commence suit to try this whole question over again in the federal court? A. I don't think you put it quite that way.

"Q. Did I not put it that way substantially? A. This is what you said: You said that the Equitable Trust Company was the plaintiff, but inferentially you seemed to give the impression that it was the Ohio Electric Power Company; and you said a number of other things—something about the attorneys that brought the suit—if you recollect that.

"Q. Did you not say you had nothing to do with it? A. Yes, sir.

"Q. And did I not say, 'No, Mr. Pruner, I don't think you have'? A. Yes, you said that. In that connection you said you thought Tracy, Chapman & Welles was a pretty good firm, but you did not think they would start a suit like this.

"Q. Did I not say I had a high opinion of them? A. Yes, you did, notwithstanding.

"Q. And the fact of the matter was I did say I could not grant the favor because I did not have authority to grant it, and I would have to talk to the other people? A. You emphatically stated you would not grant any further favors.

"Q. You knew I was not attorney for the city in the case pending in the Common Pleas Court, did you not? A. No, sir, I didn't know whether you were or not; I don't know who was attorney in that case. Mr. Craig, I think you filed an answer, did you not, in behalf of the city officials there? An answer was filed on behalf of the city by the city solicitor. I don't see his name on that.

"The Court:

Was Judge Suhr city solicitor the day you went down and tried to stop this pole removal?

"Mr. Craig:

Yes, Your Honor.

"The Court:

At that time he was city solicitor?

"The Witness:

Yes, sir.

"Q. You prepared the petition in this case—the Ohio Electric Power Company? A. Yes, sir.

"Mr. Welles:

It is already in, a copy of it.

"Mr. Craig:

Exhibit No. 47, as I understand, Mr. Pruner, is a certified copy from the clerk. You prepared the petition?

"The Witness:

Yes, sir, under great stress. That looks like a copy of the petition.

"Q. And of course you examined the answer after the petition was filed, did you not? A. Yes, sir, I did.

"Q. In order to throw some more light upon this controversy, do you remember calling me the morning you observed those poles down, or heard they were down—calling me by telephone? A. Yes, sir.

"Q. That was about seven o'clock in the morning, before you came to the office, was it not—after you received notice from someone connected with the Ohio Electric Power Company that poles were being cut down on West Main Street? A. I don't believe it was quite that early.

"Q. It was before you came down town you telephoned me from your residence, and also telephoned Judge Suhr. A. I thought the first knowledge I had of that was when I walked down the street. I don't think I knew anything about it until I came down the street.

"Q. You telephoned Judge Suhr and you telephoned me, did you not? A. No, sir, I don't believe I telephoned Judge Suhr. I phoned you, though.

"Q. What did I say? A. You were very much incensed that the action had been taken by the city officials.

"Q. Did I say what I would do? A. I thought you said you had been—maybe you said you would go out—I was thinking my talk was after you had been out—I am sure it was after you had been out. You said that you had gone out there and called them down for interfering with that line of poles and wires; and that it was in violation of your agreement with us; and that if they proceeded in that, you would have to withdraw from the case. That is the substance of what you told me.

"Q. Then did I not tell you I had to go out of town, and I could not investigate it until after I came back to find out what was behind it; and about noon did I not tell you I had been to see the heads of the departments, that is, the director of public service; and that he said

he knew nothing about it; and that he assured me there would not be any repetition; and you said that, as a matter of safety, you had gotten an injunction against the city and against the Northern Ohio Telephone Company? A. We did have a talk. I don't remember what you said about the city officials. I just do not recall that part of it.

"Do you remember a further remark I made that I thought you had not made the right man party defendant? A. No, sir, I don't recall that at all; I don't believe that was said.

"Mr. Craig:

That is all.

"Mr. Welles:

That is all, thank you, Mr. Pruner.

Thereupon the plaintiff called as a witness in its behalf

EARL F. BOXELL,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside in Toledo and am engaged in the practice of the law and have been for some years, and am a member of the firm of Tracy, Chapman & Welles, solicitors for the plaintiff in this case. I remember calling on G. Ray Craig at his office in Norwalk on or about January 3rd in company with Mr. Pruner. I was introduced to Mr. Craig, and told him I was with Tracy, Chapman & Welles; that I had come to him as one of the attorneys for Equitable Trust Company of New York; January 3, 1930, we had filed a bill of complaint in this court to enjoin the City of Norwalk on behalf of Equitable Trust

Company from interfering with the operation of the lines of the Ohio Electric Power Company in the streets of Norwalk; that the Equitable Trust Company was trustee under a mortgage given by Ohio Electric Power Company; that I knew that Mr. Craig was attorney for the City of Norwalk in the quo warranto suit; that inasmuch as we were asking for an injunction in this case and there was an injunction in effect in the Court of Common Pleas of Huron County, in favor of the wer Company, and against the city, restraining interference with the lines and operation of the company, it seemed to us that it would be advisable for an agreement to be made between counsel for the city or its proper representatives, and counsel representing Equitable Trust Company, whereby the injunction in the Common Pleas Court might be permitted to remain in effect, pending a final determination of the issues in this court; that we would be glad to have an early hearing of this case; that we could eliminate the necessity of having two hearings and that no application had been made as yet for a preliminary injunction and, that that was the reason I was down to see him.

Mr. Craig indicated by his manner that he was considerably annoyed at the request and stated that there would not be any further favors granted to the Ohio Electric Power Company as far as he was concerned, and I think he may have said that "naturally, he was not specifically retained in this case here in the Federal Court," it having just been started.

Mr. Craig said, with reference to the suit in the Federal Court, that as far as he was concerned there would not be any favors granted to the Ohio Electric Power Company and that "we" would put the Power Company out as quickly as possible from the City of Norwalk. My request was definitely declined. I think I did say to Mr. Craig that we had called at Mr. Martin's office with the idea of seeing Mr. Martin and Mr. Craig together. Mr. Martin was out. I told Mr. Craig I regarded him as chief counsel for the city in the quo warranto case and, therefore, came to him.

CROSS EXAMINATION

By Mr. Eversman:

I think that probably Mr. Craig told me he had not been employed by the city to represent it in this suit and that when I told him about commencing the suit he said it was his first knowledge of it. He said that if he should

be employed as counsel in this case, he would not enter into any stipulation. When I went to Norwalk January 3, 1930, I do not think I knew who the city solicitor was. Mr. Martin was not. I called with Mr. Pruner on Mr. E. G. Martin, but we did not find him in the office. I do not recall that I made any inquiry to learn who the city solicitor of Norwalk was.

Thereupon the plaintiff called as a witness in its behalf

WILLIAM INSULL,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at New York and am engaged in the operation of public utilities. I graduated at Cornell University in 1916 with the degree of Mechanical Engineer and a certificate of having specialized in electrical engineering. Since 1916, I have been in public utility work, except for 18 months when I was in the Signal Corps of the army. I am assistant to the president of The Electric Management and Engineering Corporation. That corporation is a subsidiary of National Electric Power Company, and Ohio Electric Power Company is a subsidiary of The National Electric Power Company.

Since 1916, I have had occasion in my business career to evaluate electrical properties, generating plants and distribution systems. Last Friday, November 7th, I inspected the plant of Ohio Electric Power Company at Norwalk. I have undertaken to determine the present sound value of the plant and distribution system and of the high tension line supplying the City of Norwalk as of this time. I made a personal inspection of the prop-

erty at Norwalk and the transmission line and estimated the present physical value in percentage of the original value and, also, made an itemized list of the major items making up the system, and applying ordinary present-day costs of unit construction to the items to find the present reproduction value new, and then applying these percentages to the present depreciated value of the property, as I estimated it. I started with the sub-station at Oberlin, running west to Norwalk, and the sub-station at Norwalk located at the power house. There are about 25 miles of transmission line.

"Q. Taking the transmission line and the generating plant at Norwalk, the equipment in the plant and distribution system, into consideration, what value did you arrive at as a total?

Mr. Eversman:

Objection. It is irrelevant and immaterial.

The Court:

The only thing he has got to prove is the amount in controversy.

Mr. Welles:

Yes, Your Honor.

The Court:

Else the court has no jurisdiction.

Mr. Eversman:

We will concede that the amount involved here is in excess of $3,000.00.

The Court:

I do not think you can do that for the purpose of jurisdiction; at least there is some doubt about it.

Mr. Welles:

I don't think you can make an agreement to confer jurisdiction on this court.

The Court:

There would be some doubt about it if you did.

Mr. Eversman:

If it is for that purpose, and that purpose only, if Your Honor please, there is other evidence in this case on that subject. As a matter of fact it seems to me there is enough evidence in the case from which the court could find the amount involved is in excess of $3,000. Moreover, if Your Honor please, there is a stipulation in respect to the tax valuation of this property.

The Court:

I think you will have to take the testimony, to be safe.

Mr. Welles:

It will not be very long.

The Court:

There are just a few questions.

Mr. Eversman:

Exception.

The Witness:

In my opinion the value of the transmission line and property in the City of Norwalk is $108,324.00.

Q. How much of that value in your opinion represents the value of the transmission line? A. $48,750.00."

The remaining part, approximately $60,000, represents, in my opinion, the sound present value in use of the powerhouse, land, powerhouse equipment and distribution system. I include no franchise value.

"Q. Assuming, Mr. Insull, that it should be necessary at this time wholly to discontinue the use of the powerhouse, the equipment and of the distribution, and to discontinue the use of the powerhouse as a generating plant for use by this company, and not now for the purpose of this question considering the high tension line, what, in your opinion would be the value, fair realizable value upon the property I have mentioned?

Mr. Eversman:

Objection; it is wholly irrelevant and immaterial.

The Court:

He is going by that to get at what the plaintiff in this case would lose if this franchise were taken away from it and the right to operate taken away.

Mr. Welles:

Yes, Your Honor.

The Court:

That establishes what the amount in controversy is in the plaintiff's point of view.

Mr. Eversman:

Exception.

The Witness:

From my experience in the past, it would cost some money to remove; in other words, the junk value would not be sufficient to pay the cost of removing the material from the present location.

The Court:

It practically would wipe out the value of the powerhouse, is that true?

The Witness:

And then it would cost some.

Mr. Welles:

Your Honor's question—wipe out the value of the powerhouse—how about the distribution system?

The Witness:

The same thing there."

The high tension transmission line supplies two sub-stations between Oberlin and Norwalk and these supply little communities or rural lines. In my opinion, the service rendered to the two small sub-stations is not sufficient to carry the cost of maintenance of the line for that purpose only, assuming that all use of the line in Norwalk were discontinued. If this high tension line from Oberlin to Norwalk in its present use and value, were no longer permitted to be used to serve the plant and distribution system of Ohio Electric Power Company in Norwalk, it would cost more to maintain the line than what the business along the line warrants. If the line were discontinued and removed, on account of discontinuance in active service the cost of recovery would more than counteract what junk value you could get out of it. If Ohio Electric Power Company is compelled to wholly cease its operations in Norwalk, there will be substantially a complete loss of $108,000.00, which I attribute to the entire system, including the transmission line.

CROSS EXAMINATION

By Mr. Craig:

I am a nephew of Samuel Insull, who is one of the heads of Middle West Utilities, one of the executive officers. Electric Management & Engineering Company is related in a business way to Ohio Electric Power Company and these companies are related to Middle West Public Utilities Company. They are subsidiaries.

My estimate of the value of the physical property at $108,324.00 includes the transmission line, sub-station at Norwalk, powerhouse at Norwalk, primary and secondary distribution system, meters and transformers. In inspecting the line, I did not go east of Oberlin on this trip. I did not consider the value of any property east of Oberlin, nor any part of the electrical distribution system in Oberlin. The next sub-station is at Birmingham, about 12 miles from Oberlin, and the other sub-station is located nearer to Norwalk, at Stop No. 37 on the old railway that ran along the transmission line.

I have not heretofore been out to estimate the value of this property. I had been out on an inspection trip of the property. I had nothing to do with the estimation of the value of the entire property west of Elyria, when Victor Emanuel transferred it to Ohio Electric Power

Company. I did not have anything to do with Exhibit No. 19, and am not familiar with those figures. I was not with my present company, when Emanuel transferred the property to Ohio Electric Power Company.

In estimating the value of property for reports to public utilities commissions and to tax commissions, etc., I am called upon in a way to make an estimate of the values. I am somewhat acquainted with the financial affairs and the various properties of Ohio Electric Power Company and for a short time have exercised more or less supervision over the estimating of values of the respective properties that constitute a part of that system. I know all the different properties belonging to Ohio Electric Power Company, located in the City of Norwalk, and have more or less familiarity with the different units that constitute the Ohio property of that company and the property which they have in different counties in Ohio.

I have approximate knowledge of the total valuation of the properties of Ohio Electric Power Company in the State of Ohio. I was acquainted with Mr. J. A. Ward, of Sidney, Ohio. J. A. Ward is not now vice-president of Ohio Electric Power Company, but I think C. E. Bramble was assistant secretary March 27th.

I know approximately where the Village of Wakeman is. Ohio Electric Power Company had been supplying electrical power off this high tension transmission line formerly used by the Railroad Company for the Village of Wakeman.

I do not have any knowledge about whether in a report made by Ohio Electric Power Company to the Tax Commission of Ohio for the year ending January 1, 1930, all the property of Ohio Electric Power Company in Huron County was returned at a valuation of $19,632.99. I do not have any knowledge about that. I have nothing to do with the preparation of tax reports. Mr. Bramble I suppose has something to do with the preparation of tax reports. He lives at Sidney. I made a written inventory of the major items of property included in my valuation of $108,000.00. I have the report with me. I will be willing to have it inspected, if it is all right with counsel.

When I made the inspection of the Ohio Electric Power Company at Norwalk, I was there about 6½ hours. While there, I drove over the transmission line and drove over the system. When I say drove over the transmission line, I mean that I drove along the road from Norwalk to Oberlin taking the cross-roads, so as to

view the transmission line from each cross-road, and got out and looked at it at the different cross-roads. That was all I did, so far as the transmission line was concerned. At Norwalk, I went over the primary lines and secondary lines, driving up and down the streets and went to the generating plant and inside the same. I looked the plant over; took the name-plate readings of the different places of equipment, giving the sizes, etc. That was all I did, with reference to inspecting the plant. That took 6½ hours.

I did not make my calculations at Norwalk, but worked on Saturday, Sunday and Monday.

The discrepancy between paragraph 1 and para-2, on page 3 of my description (Exhibit D) is due to the fact that ordinarily, at the present time, we use copper wire and not aluminum wire. I understand that there is a No. 2 aluminum cable in that transmission line, which I did not caliper, but I inquired of some employee of the company as to the size. I can tell approximately the size of wire. In making my estimate on the reproduction cost new of this plant, I took the present day price of copper wire. I cannot say what the price of No. 2 copper wire is as compared with No. 2 aluminum. I know that the cost of aluminum is somewhat less than copper. I would not say one-third less per pound. The transmission line, as I understand it, consists of poles, wires, insulators and cross-arms. The price that I have allowed for No. 2 copper wire per pound, in arriving at a price for the transmission line, is per mile price, as supplied me by the engineering department, based on average prices of today. I placed a price per mile on the entire transmission line as I know that price is approximately the cost, but right now I could not break that price down to its elements. It is an average price. From experience that is what the cost is.

The poles in the transmission line are 35-foot poles. I do not know what price is used per pole. I do not know the kind of wood that is in these poles. There are different types of poles along the line. I did not make an investigation to determine what kind of poles there were on this transmission line, either as the kind of wood or the diameter at the top. They were average poles, such as we use right along. The cost of labor in setting these poles is in the figures. If I had broken it down, I would have arrived at approximately the same prices. The cost of labor in setting these poles would be around $7 to $8. The replacement price of new poles, 35 feet long, is $16 per pole, probably a 7-inch top.

I am not prepared to state what would be the cost of labor in installing wires and cross-arms. That would be a figure I would have to have, if I were to break down this figure of $3,000. I was figuring on wooden arms, in my $3,000 basis. My estimate embraces Keystone metal arms for 23 miles. I can not give you the price of Keystone metal arms. My estimate is on the cost per mile basis. In my statement, I assumed that Keystone metal arms were used approximately a distance of 23 miles on these transmission lines, and I estimated 2 miles with wooden arms. I don't know the cost of wooden arms per mile.

In making my estimate, I noted porcelain insulators, 35,000 volt, but I did not estimate the number of these insulators. The price is fixed on the number of insulators you would have. I did not fix any price per insulator, but I know there are more insulators in that particular transmission line than one would have with a 300-foot span. The present span is 125 feet average. I used a 1930 or 1929 price, an average price between the two years. I could not say whether the price varied much during 1930, but I used this for both years, based on the $3,000 per mile that we had been using for 1929 and 1930. In buying and selling plants, we estimate on that basis.

In my Exhibit D on page 3, by "substation" I mean the transformers, regulators, lightning arresters, fuses and disconnect switches partly in the building and partly on the outside. By building, I mean the generator plant, the large building shown in Exhibit A. The small building I understand was a part of a gas plant.

I do not know when the three 100-K. V. A. transformers were installed, but I imagine when this line was changed from 25 to 60 cycles, but I don't know the exact date. I judge the equipment is around 7 or 8 years of age. The transformers I priced at $2,298.00. I could not say how old the lightning arresters are, nor could I tell from appearance. The voltage regulators appear to be comparatively new, possibly 3 years.

The large building shown on Exhibit A is in actual use and the entire building is used. I went inside of that building. In estimating the cost of reproduction of that building at 20c per cubic foot, I will say it is the price I have received lately as the price of similar buildings. I understood the "tandem compound steam engine John T. Noyes Mfg. Co." was put in when the plant was built in 1895. We are still using engines of that type. I don't know as you could duplicate that

particular engine, but we have engines of the same type. I did not place any individual value on it and can not say what its fair reproduction cost would be. The belt driven generator manufactured by The Allis Chalmers Mfg. Company, I assumed was purchased in 1895. I placed no individual price on it, but put it under the total price. It is not exactly an obsolete type of generator. I expect you could get one like it from The Allis Chalmers Company. I can not give you any individual price.

There was installed a belt-driven exciter, Westinghouse Electric & Manufacturing Company, of a certain type, the cost of which I can not give you. It was installed at the same time, approximately, in 1895. It is not an obsolete type of exciter. I can not give you the reproduction cost of the 150 horsepower water tube Sterling boiler. I understand that was installed when the other equipment was. I think the sheet iron breeching is a replacement, but can not say when it was replaced and can not give you the cost of it, new. I expect the switchboard panels, referred to on page 4, were installed at the same time, but I can not give the individual cost.

The distribution system refers to the wiring from the station, this brick building, along the streets of Norwalk; and then from the streets to the individual consumers, including transformers and meters and poles. In my estimate, I have assumed that there are 8.45 miles of primary distribution. The primary distribution is the wire line that takes the power from the generating plant to the transformer, and that mileage is approximately 8.45. I did not get that myself, but got it from the Sidney office. The secondary wire is the wire strung from the transformer along the pole line to the last pole before entering the house. I have estimated the length of the secondary distribution at 8.10 miles. That was taken off the map at Sidney. By consolidating the primary and secondary lines, I arrived at the total wire mileage. Some of the distance will have both primary and secondary wires. The 13.11 can not be ascertained, manifestly, by adding 8.45 and 8.10, but has to be scaled off the map. I can not say what the total mileage of the primary and secondary lines and the line going from the pole to the individual consumer is, offhand. There is no way of computing it from any figure I have here. My estimate of the cost of distribution system is arrived at by multiplying an average distribution by the number of customers in Norwalk, and that estimate is based

upon a three-wire single-phase service. I do not know how many of those 453 customers have a three-wire single-phase service. I do not know it to be a fact that there are but 20 customers who have a three-wire single-phase service, and that only 10 customers have a three-wire three-phase service. If that is true, then all the balance of the customers would have a two-wire service, and if that were true, it would affect my calculation by a very small percentage, because my calculation is based upon three-wire single-phase service. If we had 423 customers with two-wire single-phase service it would affect my figures by a very small percentage. It would not affect it enough, so as to make a difference between $66.71 per customer and $50.00 per customer.

On the basis of my calculation, I took the footage of wire for each customer as an average. It would be the six lengths of 125 feet, that is, 750 feet plus, according to the calculations there, three wires of about 125 feet, and the service wires from the house to the pole.

The property, which is covered by my Exhibit D, has no scrap value outside of the land, which I estimate at $1500. The cost of taking the equipment down would be as great as the scrap value of it and in the ordinary sense that property has no scrap value. Whether, if I were to build a new distribution system at Norwalk I would buy a different type of equipment than that now in the brick building, would depend upon the size of the load and upon how far away I would be from a larger source of supply, and, if I had a small, isolated plant away from a larger generating plant, the probability is I would put in a steam unit very much on the order of this one.

In my estimate of distribution, which appears on page 1 of my exhibit, in arriving at a figure of $30,154.00, I did not assume that all the electric wires were located upon poles of the Ohio Electric, and I do not have any exact number of poles. I did not figure it by poles, but there are more poles in the City of Norwalk owned by the company than one would derive by taking one span each for 453 customers. On Exhibit 49, the Ohio Electric Company has a wire line along Main Street. There are poles along there, and it was my understanding that those poles were the poles of the Ohio Electric Company and I assume that to be the fact, but my estimate allows for a certain percentage of poles used by the Ohio Electric which it does not own. It is small in comparison with the total number of poles owned by the company. In my estimate, I assume that the Ohio Electric Com-

pany owned one pole per customer and that the company owned 453 poles, and that they were in use on the day when I made my inspection.

RE-DIRECT EXAMINATION

By Mr. Welles:

The method of arriving at valuation of property of this character which I have used is in common and ordinary use. Experience has shown me that by this method which I used I can arrive at as fair and accurate an estimate of the value of property as though I broke it down to each separate unit and applied unit prices.

RE-CROSS EXAMINATION

By Mr. Eversman:

I know approximately the method of valuation used by Public Utilities Commission of Ohio and they usually count each item and by getting the price in their estimate they get the price on each component unit. This is a method I use when buying plants. It gives a very close approximation and I think the price is conservative.

Thereupon the plaintiff called as a witness in its behalf

CLINTON HEATH,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I am employed by Ohio Electric Power Company at Norwalk as a lineman and have been so employed about three years last past. During part of October, 1927, I was employed by the City of Norwalk as a lineman under

M. G. Irvin, who is superintendent of electricity and water. Late in October, 1927, I remember of being engaged in taking down some poles and lines on West Main Street in Norwalk. Mr. Irvin came out to where the boys were working and told us to report to the sub-station at 4:00 o'clock the following morning. Our usual time for reporting was 7:00. Other employees and I reported to Mr. Irvin at 4:00 o'clock the next morning, when it was dark and we went out West Main Street. There were probably six or seven men who so reported. I rode with Mr. Irvin, who was superintendent of the lines for the City of Norwalk. When we assembled that morning, Mr. Irvin said, "We are going to take down some Ohio Electric Power poles." Some of the men went out in a city truck. We started to work from west to east. Another lineman and I went ahead and freed the poles and crossarms and some of the other men followed and took the poles down. Six or seven poles, possibly eight, were taken down. I should say that this work covered four ordinary city blocks. The poles were spaced I imagine about 150 feet apart. We did not take every pole down. I remember some transformers were taken down. Some poles were skipped. After taking down the poles, the lines were left in a rather unsafe shape, although we tried to keep the wires up in the clear, so no one would run into them. I left the work at 8:00 o'clock that morning and went somewhere else and did not return. The boys were working when I left the job. Mr. Irvin directed the job. I do not know how long Mr. Irvin remained on the job. I did not see him when I left there. He was there nearly to the time when I left. Mr. Irvin directed me as to which of the poles should be removed.

Shortly after that, I left the employ of the city and then became employed by Ohio Electric Power Company. The most of the work in replacing poles had been done when I went to work for Ohio Electric Power Company. I helped to do a little straightening.

The lines, which were taken down, carried 2200 volts and were known as primary lines.

No cross examination.

Thereupon the plaintiff called as a witness in its behalf

ALFRED V. GREENFELDER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Norwalk, Ohio, and am and have been, since Ohio Electric Power Company took over the property at Norwalk, its service man. Prior to that time I had been employed by Cleveland & Southern for a year or a year and a half at Norwalk. I was there when Mr. Emanuel held title to the property.

In October, 1927, I lived at Monroeville, west of Norwalk. In the morning in late October, 1927, as I was going to work about a quarter to seven I noticed several men working as I drove by. I did not stop but noticed they were our poles or poles holding our wires, which were being removed. I did not notice at that time how many poles there were. I saw one transformer set on the curb line. When I went by, four or five men were engaged in the work. I saw a city truck there. I do not recall seeing Mr. Irvin. I saw Mr. Heath. I think I recognized a man by the name of Lysle Stewart. The wires, which had been removed from the poles were hanging up. The trees seemed to hold them off the ground. Had it not been for the limbs, I think they would have been lying on the ground. The cross-arms in some cases were still attached to the wires holding them apart. The cross-arms weighted down the wires and some of the wires were in contact with the trees. Those lines carried 2200 volts.

When I got to the office, I called Mr. Turkle, the manager, at his residence. Our line gang restored the lines, which had been taken down that morning. After lunch, I was out to the place where the lines had been taken down. It was on the south side of Main Street from Church Street west to Pleasant Street. It would cover four average city blocks. Ohio Electric Power Company put in new poles of their own and reattached the lines to those poles.

The lines ordered removed in plaintiff's Exhibit 51 were taken down by the City of Norwalk.

The lines ordered taken down in plaintiff's Exhibit 52 were taken down by Ohio Electric Power Company.

The section of line ordered taken down in plaintiff's

Exhibit 63 on Benedict Avenue, from Olive Street south to the residence known as No. 196, was taken down by Ohio Electric Power Company. The wires on East Main Street, extending from the transformer on the north side of the street in front of No. 170 crossing the street and extending one span east to the property known as No. 176 East Main Street, was taken down by Ohio Electric Power Company. The three-phase 2200-volt line on North West Street, from West Main Street north to Jefferson Street and thence on Jefferson Street to Wheeling Avenue, was taken down, but to my knowledge the company did not take the wire down, and I did not see the city take it down, but it was taken down.

In plaintiff's Exhibit No. 57, I think there is an error in that one of the streets is characterized "Water Street," and I imagine it to be Railroad Avenue. That line has been taken down but not by Ohio Electric Power Company, and I did not see that removed either.

The secondary wires on Cline Street have been removed by Ohio Electric Power Company. The ones mentioned in the third paragraph were removed by the city; the ones in the fourth paragraph were removed by Ohio Electric Company; and the wire referred to in the fifth paragraph was not removed. It is on West Elm Street but is still up. I believe our manager received a letter from some city official that we were allowed to leave it there.

The lines mentioned in the first paragraph of plaintiff's Exhibit No. 58 were taken down by Ohio Electric Power Company. The next paragraph refers to the cable and conduit that Mr. Turkle testified to.

The lines, referred to in plaintiff's Exhibit No. 59, were taken down by Ohio Electric Power Company.

The section of lines, referred to in first paragraph of plaintiff's Exhibit 61, was removed by Ohio Electric Power Company. The wires, referred to in next paragraph, still remain. The lines, referred to in next paragraph, have been removed by our company, and the lines, in the next paragraph, have, also, been removed by our company, and the lines, referred to in the next paragraph, have been removed by our company. Likewise, as to the lines mentioned in the next paragraph. All the lines, referred to in those paragraphs, except one on State Street, have been removed by our company. One wire of the three-wire service on East Main Street running west from No. 117 West to the transformer has been removed by our company. The last line is still there on private property.

Plaintiff's Exhibit No. 62 signed by Mr. Irvin and Mr. Webster, director of public service, refers to the same section of line, which was involved in the episode of late October, 1927, I mean the lines and poles, which the city workmen took down on West Main Street.

The sections of lines, mentioned in plaintiff's Exhibit No. 63, have been removed, but I don't know who removed them.

The lines, mentioned in the first paragraph of plaintiff's Exhibit No. 66, were removed, but not by our company. The lines, referred to in the second paragraph and the next two paragraphs, were removed by the Ohio Electric Power Company.

There is a joint use of poles being made by the city and the Ohio Electric Power Company in Norwalk and has been in effect as long as I have been connected with the company in Norwalk. About 50 poles of the Ohio Electric Power Company are used by the city for the support of its lines in some way, and about 70 poles of the city are used by Ohio Electric Power Company for the support of its lines in some way.

Plaintiff's Exhibit No. 49 is the general layout of the streets of the City of Norwalk. These sections, marked with heavy red pencil, represent wires and lines removed. That exhibit is substantially an accurate picture of the distribution system of the Ohio Electric Power Company in the streets and alleys of Norwalk at the present time. The symbols in the lower right-hand corner, indicating respectively the Ohio Electric Power Company's poles and the Telephone Company's poles, etc., are correctly shown upon this exhibit.

During September, 1927, new No. 4 wire was put in from the plant north on Linwood to Main, east on Main to W. & L. E. Railroad, thence north to The Wisconsin Food Products Company. When this one wire was added, there was already a line over that territory to The Gallup Ruffing Company. The line from The Gallup Ruffing Company to The Wisconsin Food Products Company is on private property.

The slip on the lower part of the exhibit stating that during November, 1927, three new No. 6 W. P. wires were put in from Norwood to Dairy and service was secondary three-wire No. 4/0 is correct. When that wire was put in there was at the time a line extending over the same route.

The key to plaintiff's Exhibit No. 50, as shown by the use of different colored lines and the explanations thereof in the lower right-hand corner, is correct. I have

carefully examined plaintiff's Exhibit 50 to ascertain whether it correctly depicts changes which occurred in the system of the Ohio Electric Power Company in the streets of Norwalk since sometime in 1925, and said Exhibit 50 correctly shows the changes which have occurred in the system in the streets of Norwalk of the Ohio Electric Power Company in that period. I, as service man and lineman for the Ohio Electric Power Company, have been, during that period, in such touch with the actual physical changes in its system in said city that I can say that Exhibit No. 50 does correctly depict the changes which have occurred.

Mr. Boxell:

We will now offer Plaintiff's Exhibits Nos. 49 and 50.

CROSS EXAMINATION

By Mr. Craig:

The symbols on Exhibit No. 48 represent the poles that belong to the Ohio Electric Power Company, but some of these symbolized poles belong to the Telephone Company, and there are no marks here to indicate the lines of the City of Norwalk, but only the lines of the Telephone Company and the Ohio Electric Power Company. As you go west on the south side of West Main Street from the intersection of Whittlesey and Benedict Avenues, these "O" symbols belong to the Telephone Company clear out to West Street, but where there is a heavy mark inside the circle those are Ohio Electric Power Company poles.

The Lake Shore Electric is using some of these poles for span wires, but the poles, which The Lake Shore Electric is using are not indicated on this map. It is a fact that wherever the presence of poles belonging to the Ohio Electric Company is indicated on Exhibit No. 48, there are also poles and pole lines for the transmission of electricity on the same streets operated by the Municipal Plant of the City of Norwalk. Those lines are not indicated. I had nothing to do with the preparation of Exhibit No. 48. I saw it first after it was made in our office in 1925, I think. Our lines seldom run over a block, without having a consumer on the line. I do not believe there is one full block any place, but there may be on West Street.

These heavy red lines on Exhibit No. 49 indicate spaces where lines have been removed without replacement. My knowledge as to Exhibit No. 49 is about the

same as my knowledge with reference to Exhibit No. 48, and that is equally true with reference to Exhibit No. 50. I was over this line just a few days ago and checked over these removals to be sure I was right. The wires on Pine Street have been removed on orders from the city and there have been no replacements. On parts of our lines we took down wires and replaced new wires, but there have been no replacements at all where these red lines are shown.

When the line was extended out East Main Street in an easterly direction to the Huron Division of the Wheeling & Lake Erie Railroad and then extended down an alley or side street to the plant of Wisconsin Food Products Company, I was not with the company. It has been rebuilt now, but not extended. There was an extension made on private property from The Gallup Ruffing Company to the plant of The Wisconsin Food Products Company.

Plaintiff's Exhibits 49 and 50 were received by the court.

Thereupon the plaintiff called as a witness in its behalf

JOHN A. NESTER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at Lakewood, Ohio, and am a railway superintendent, connected with The Cleveland & Southwestern Railway & Light Company. I was connected with the Northern Gas & Electric in 1899 to 1904, engaged in operating the electric light and power system in the City of Norwalk, Ohio. First I was with The Northern Gas

& Electric and later with The Norwalk Gas & Electric. I left Norwalk in the early spring of 1904. I was local manager for those companies and of this particular plant and distribution system. These companies were predecessor companies of the Ohio Electric Power Company. I was familiar when I was there with the distribution system and have a recollection now of what the conditions were when I lived in Norwalk, in a general way. There were certain lines of wire and poles on certain streets, which were used only for commercial lighting purposes in 1904, and there were other lines of poles, which carried both the commercial lighting wires and the street lighting wires, and there were some poles, which carried only street lighting wires. The direct current was used for street lighting and the alternating current for commercial lighting. The incandescent lights then in use in the City of Norwalk could not be serviced and supplied with current from the street lighting system.

CROSS EXAMINATION

By Mr. Craig:

I was acquainted with Silas T. Crawford, who lived in Norwalk and who procured some of the rights-of-way for The Cleveland & Southwestern Traction Company, when it built its line from Oberlin to Norwalk. So far as I know Mr. Crawford had not been one of the officials of the company and I never knew of his having any title or authority. I could not name the streets, which were supplied with commercial lines, without the presence of the lighting lines. It is possible I could name a single street. I think Hickory Street was one. It is about two blocks deep and extends off from Linwood Avenue. I remember that was one instance where we ran a line. There were one or two residences on Hickory Street. I can not designate another street, other than this. With our direct current lines, used for street lighting system, we could not cut those and duck here and there, like we did with the commercial lines. The A-C lines had to be handled differently from the direct current. We ducked over here to this corner and ducked over there to that corner for that intersection, but the territory in between, some of those streets, was taken care of by commercial light lines and poles only. In the main, I would say both systems occupied the same poles, in many instances they were both on the same line of poles.

I had charge of The Cleveland & Southwestern Traction Company's generating plant at Norwalk and was

acquainted with the type of machinery used. I have not been in there for 15 years. I remember when B. P. Foster, as manager of the Northern Electric Company, built that plant on the Wheeling & Lake Erie. There was no new machinery put in there since it was built so far as I know, except such as was put in during the time I was local manager to furnish power for The Cleveland & Southwestern Railway. When it built into Norwalk, we made arrangements with it to furnish power for the west end of its lines, and we put in additional machinery at that time for that purpose. It was not a sub-station. We put in extra boilers and a generator, but it was not used as a sub-station. It was a generating plant. It was for regular service and we furnished the power to operate its cars on the entire west end. Our tracks came to the east city limits and then came over the tracks of The Lake Shore Railway, and after reaching its tracks we used its electricity.

Upon the conclusion of Mr. Nester's testimony, Mr. Eversman for defendant offered, in connection with the cross examination of Mr. Insull, Defendant's Exhibit D, to which there was no objection.

Then Mr. Welles, on behalf of plaintiff, withdrew original Exhibit No. 1 and substituted therefor another Exhibit 1, which was admitted as Plaintiff's Exhibit No. 1, with the reservation of objections thereto by defendant to the relevancy and materiality of the part thereof relating to payment of taxes by the Ohio Electric Power Company.

Plaintiff's Exhibits Numbers 70, 71, 72, 73, 74 and 75 were admitted. The following stipulation was then made between counsel:

"It is stipulated and agreed between the parties that at least since the year 1912 the office of director of public service and the office of director of public safety of the City of Norwalk have been combined and have been held by one person exercising the powers, duties, and authority of both offices."

Plaintiff's Exhibits Numbers 67, 68 and 69 were offered separately, it being agreed by counsel that there was no question as to their authenticity, sending and receipt. The counsel for the defendant objected to their introduction upon the ground that they were irrelevant and immaterial to the issues of the case. The exhibits were accepted by the court and exception allowed. The plaintiff then rested.

Defendant's Exhibits E and J were admitted without objection by the plaintiff. Defendant's Exhibits F, H and I were admitted over the objection of plaintiff's counsel that they have no bearing upon the issues in the case, the plaintiff reserving an exception to the admission of each of them. Defendant's Exhibit G was admitted over the objection of plaintiff's counsel that it has no bearing upon the question as to whether plaintiff's mortgagor has a perpetual lighting franchise, that there is no plea of estoppel on the part of the city against the plaintiff to the effect that plaintiff is estopped to claim a perpetual franchise, that it has no bearing upon plaintiff's plea that the city is estopped and is in no way binding upon the plaintiff. Plaintiff reserved an exception to its admission. Defendant's Exhibit C was offered in evidence by the defendant, to which plaintiff objected on the ground that it had no bearing upon the issues in the case, that it was not prepared by the plaintiff, that it was an admission against interest by someone not a party to the case and not binding upon the plaintiff. It was admitted over these objections with plaintiff reserving an exception to its admission.

It was then stipulated by counsel that F. E. Meyers of Ashland, Ohio, was president and director of The Cleveland & Southwestern Traction Company during the years 1914 to 1915, both inclusive.

Thereupon defendant called as a witness in its behalf

C. B. LAWRENCE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I have resideed at Norwalk, Ohio, for 35 years and operate there a general insurance agency. I was a member of the Council of the City of Norwalk in 1924 or 1925. I lived in Norwalk in the years 1914 and 1915, and recall attending a meeting held in the council room relative to the electric light situation and remember when Mr. Myers—I think F. E. Myers—who was president of The Cleveland & Southwestern, was there.

The plaintiff was allowed a general objection to all testimony of C. B. Lawrence, George W. Fifner, and Fred B. Cole relating to statements of Mr. F. E. Myers or other officers of The Cleveland & Southwestern Traction Company requesting or relative to a franchise or rights for such company in the City of Norwalk, upon the ground that there is no claim by the city that plaintiff is estopped to claim a perpetual franchise, that such testimony has no bearing on plaintiff's claim that the city is estopped to deny that plaintiff has a perpetual franchise, and not binding upon the plaintiff and all such testimony was received over such objection and a general exception thereto was allowed.

The meeting was in the autumn or winter of 1914 and was prior to the completion of the Municipal Plant. It was a kind of indignation meeting of the citizens on account of the poor service, which had been given. I don't know that Mr. Myers stated specifically, but it was generally understood that Mr. Myers was president of The Cleveland & Southwestern Traction Company. Mr. Myers was asked, as I recall it now, why they were not giving us better service. Mr. Myers said they could not go ahead with further improvements, unless they obtained a new franchise. No cross examination.

Thereupon defendant called as a witness in his behalf

GEORGE W. FIFNER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I have lived at Norwalk, Ohio, 46 years. I have been a councilman of the City of Norwalk since 1907, with a lapse of two years, and was councilman in the years 1911 to 1915, inclusive. During that time, I recall meetings of the members of the council and the city administration with officials of The Cleveland & Southwestern Traction Company and remember a meeting held in the evening, to which the general public was invited in 1914. I was present, and Mr. Myers, who was president of The Cleveland & Southwestern Traction Company, was also present.

Upon the matter of a franchise, Mr. Myers said he could not give us any better service unless he had another franchise, a renewal of franchise.

I was at two meetings, when Mr. Myers was present. The other meeting was about 1914, the second meeting. It was a mass meeting. At this second meeting Mr. Myers talked along the same line, practically the same thing, that he could not give us any better service because they wanted a new franchise, and until they got it, they could not.

The two meetings were about seven or eight weeks apart.

No cross examination.

Thereupon the defendant called as a witness in its behalf

FRED B. COLE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I have lived at Norwalk, Ohio, since 1890, and have served as a city councilman six terms of two years each. I was a member of the council in 1913, 1914, and 1915. I remember a public meeting held, attended by members of the city administration, the public in general and certain people from The Cleveland & Southwestern Traction Company, in 1914, in the council room. I was present. Mr. Wolfe, Mr. Ginn and Mr. Myers were present for The Cleveland & Southwestern Traction Company. Mr. Frank Ginn was their attorney and, I think, Mr. Wolfe, was their attorney, representing the company in some way, I don't know just exactly. Both Mr. Ginn and Mr. Wolfe were from Cleveland and they made representations to the council or to the meeting for a renewal of the franchise. Mr. F. E. Myers was also there. I did not hear him say what office he held.

"Q. Do you know as a matter of fact whether he was president of The Cleveland & Southwestern Traction Company at that time? A. His name appeared on their stationery at that time."

In answer to the opposition at that meeting, on account of poor service that had been furnished to Norwalk, he said he was surprised to hear it; that it never came to his notice before; and that if they were given a new franchise, as an officer of the company, he would guarantee an improvement in the service.

I was present at another meeting and had a conversation with Mr. Myers after the meeting had adjourned. Mr. Myers was talking to me and two other members of the council that were there. He said that he wished the franchise, and if he did not get it we would lose the railroad because the pump works could not stand the strain of supporting the railroad any longer. Nothing was said about the length of franchise they wanted.

No cross examination.

Thereupon the defendant called as a witness in its behalf

BURT P. WEBSTER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I live at Norwalk, Ohio, and during the last three or four years held the position of director of public service, which carries with it the position of director of public safety in Norwalk. I acted as such from September 1, 1926, to February 1, 1929. During that time, Mr. Irvin was manager of the electric lighting and water works departments. I recall a conversation with Judge Suhr and Mr. Craig about the time an action was brought by the city against Ohio Electric Power Company.

"Q. Do you recall about the time the action was brought by the city against the Ohio Electric Power Company, a conversation with Judge Suhr and Mr. Craig relative to an injunction? A. Yes, sir.

Q. What did they tell you at that time?

Mr. Welles:

Objection to any conversation between counsel for the city and the city officials.

The Court:

What is the purpose of it?

Mr. Martin:

To show they had been notified that there was an injunction—I meant quo warranto action by the city against the Ohio Electric Power Company, or previous action, to show that the instructions were sent to the city administration and that they were followed out relative to the injunction. It is claimed here that the city officials violated that injunction.

The Court:

You do not claim they violated any injunction.

Mr. Welles:

No, Your Honor. You mean an agreement.

Mr. Martin:

I mean an agreement.

The Court:

An agreement prior to the injunction of the state court?

Mr. Martin:

Yes.

The Court:

All right. Proceed.

Mr. Welles:

Note an exception.

Q. Do you recall what they told you at that time relative to the agreement entered into? A. They made an agreement with the attorneys for the Ohio Electric Power Company that the lines should not be disturbed."

I remember a certain day in October, 1927, when Mr. Craig and Judge Suhr called my attention to some property that had been torn down. I was then director of public service and was just coming out of my office, when they informed me some property had been destroyed. Previous to that time, and at no time, did Mr. Irvin or anyone else destroy any property, cut down any wires or poles of the Ohio Electric Power Company, with my knowledge or consent.

Mr. Irvin's official position was superintendent of light and water. He had occupied that same position under a prior director of public service, Mr. Leighton.

Referring to the map, showing the pole line on West Main Street and on the south side thereof between Church Street and West Street, I did not at any time instruct or order anybody to tear down any poles or wires of the Ohio Electric Power Company, and none were torn down with my knowledge or consent; nor was I informed that such action was going to be taken. I went out on West Main Street the day this matter was called to my attention, and the poles, which were down, were between Church Street and South Pleasant Street, west of The Wheeling & Lake Erie overhead bridge on the south side of West Main Street. These poles and wires were not taken down with my consent or instruction. I had inspected those poles along Main Street previous to that time and some of them were in very bad condition. The telephone company's poles had been in there a long time and were badly rotted at the bottom, so that some of them would surely swing. Most of the poles leaned in towards the street. The year before, an accident had occurred in that same location, where those poles were, but I did not make any inspection then. The telephone poles had been erected a long time and were in bad condition. I gave orders to the telephone company for the removal of those poles.

Plaintiff's Exhibit No. 62 carries my signature and it was sent out by Mr. Irvin. The telephone company had taken most of its wires off the poles that were taken down, and had laid a conduit, but there was still some

contact. The wires had been taken down by someone. There was just a limited use by the telephone company at that time. The telephone company had taken down some of the drop wires, but not all of their wires.

CROSS EXAMINATION

By Mr. Boxell:

I was aware of the passage by the city council of the ordinance of July 1, 1924, regulating the construction of poles, lines and wires by telephone companies and electric light companies in the City of Norwalk, and I knew that I was charged with its enforcement and I tried, at all times, to carry out the terms of that ordinance.

"Mr. Eversman:

This evidence may all go in under our objection and exception that it is entirely irrelevant and immaterial what he did under the ordinance.

"The Court:

I suppose the only thing relevant is what they did with this particular company. That certainly is relevant.

"Mr. Eversman:

Whatever they did with respect to the ordinance of July 1st, 1924, we conceive to be an irrelevant issue in this case.

"The Court:

This testimony may go in over your objection. A decision on the merits will determine whether it will stay in."

Plaintiff's Exhibit No. 62 is copy of a letter addressed to The Local Telephone Company at Norwalk bearing the signature of Mr. Irvin and my signature, as director of Public Service. The poles, referred to in that letter, were located between Church Street and 200 feet west of South Pleasant Street on West Main Street, in the region where the poles were torn down in the episode of late October, 1927. I was out there after they were torn down and saw some of them that were down. The poles were down, but the wires were not down. They were supported by poles which held them up. The wires were 10 feet or more above the ground. They had cross-arms attached to them. I think the cross-arms were hanging by the wires in some places, but not many of them.

I was apprised of an agreement by Mr. Craig, in 1927, under which the city would not attempt to move

any lines of the Ohio Electric Power Company, and I understood that during that time that company would not attempt any extension of its lines. The poles, referred to in Plaintiff's Exhibit No. 62, in some places supported the Ohio Electric Power Company's lines. Before issuing Plaintiff's Exhibit No. 62, I don't remember getting in touch with Mr. Craig, relative to issuing it. I don't think I did.

At the time the order was given in Exhibit No. 62, the telephone company had its own pole line in there. There were three pole lines in there on this one street, and there were places where it was necessary to make contacts with these poles, in order to keep the wires free from the poles. Some of the poles had been erected for a long time and the wires ran parallel, and in order to carry so many wires it was necessary one set of wires had to keep a certain distance from the other set of wires. The lines of Ohio Electric Power Company may have had contact with the poles referred to in Exhibit No. 62. By contact, I mean keeping them free from swinging on other wires. They had to be fastened to these poles, but I am not a lineman and I don't know whether they were fastened to these poles or not. I had observed conditions there before, of the lines and the poles. The lines were all mixed up, and in this mess of poles it was almost impossible to tell which company owned a particular pole. To be acquainted with the condition of the pole lines was rather up to the superintendent of light. He worked under, and took orders from, me. It would be a hard matter for a man in the office to understand all the lines in the city. It was within my duties according to the statute, yes.

There might have been contact between these particular poles referred to in Plaintiff's Exhibit No. 62. The line of the Ohio Electric Power Company may have had some contact there, but I could not tell the particular pole. I did not have that possibility in mind, when I issued the order.

Lines of the telephone company, The Lake Shore Electric and the Ohio Electric Power Company were all in there, and when I issued the order, I was aware of the condition. I do not know that I went over the line. I did not endeavor to discover whether these particular poles, which I was ordering down, supported lines of the Ohio Electric Power Company. The poles, referred to in the second paragraph of Plaintiff's Exhibit No. 62, were all in a dangerous condition and they had to be removed. Referring to that second paragraph, we had in

mind that the poles were in a dangerous condition and should be removed; that there was a pole condition there that was out of all reason. There were too many poles along that street. The Ohio Electric Power Company had its own poles to support its wires at this point, and those poles were in a very dangerous condition. There were three pole lines, practically four pole lines, and there were poles so scattered that there were two or three in a huddle. Referring to the second paragraph of Plaintiff's Exhibit No. 62, it meant that they could not sell those poles, that they had no right to dispose of them. The "tenants" there referred to were The Lake Shore Electric and the Ohio Electric Power. I was covering the whole situation and had in mind both the Ohio Electric Power Company and The Lake Shore Electric. I no not remember of taking up with Mr. Craig the issuance of that order; it may have been taken up with him. I did not take the matter up with the mayor, the council, or any official of the city. I had been informed of the agreement between representatives of the Ohio Electric Power Company and the City of Norwalk. I did not direct or instruct Mr. Irvin to carry out the things stated in this letter, Plaintiff's Exhibit No. 62. I did not withdraw this order. At the time it was written, July 30, 1927, I do not remember whether Mr. Irvin signed it in my presence. This letter was dictated by Mr. Irvin and I recall that he brought it to me for my signature and thereafter I signed it. It was mailed to the Northern Ohio Telephone Company and this particular copy to the Ohio Electric Power Company. It went either out of my office or Mr. Irvin's office. I never instructed Mr. Irvin to carry out these orders. We had no intentions of carrying it out. That is, I never instructed Mr. Irvin to carry out this order. I never instructed Mr. Irvin to carry out or not to carry out the orders contained in Exhibit No. 62, but I mailed the letter to the telephone company and the Ohio Electric Power Company and after that time I don't think I gave him any instructions.

That is my signature on Plaintiff's Exhibit No. 64, as director of public service. I caused that letter to be mailed to Mr. Turkle, manager of Ohio Electric Power Company and in so doing I was proceeding under the ordinance of July 1, 1924.

It is my best recollection that I received the original letter, Plaintiff's Exhibit No. 65, and it has reference to the same situation as involved in Exhibit No. 64.

Upon receipt of the original of Plaintiff's Exhibit No. 65, I did not follow up the request contained in my

letter of September 22nd, Exhibit 64, on account of our agreement. Both exhibits refer to the same situation. The Ohio Electric Power Company were extending their lines, enlarging, that is putting on new wires from their power plant to the Butter Factory on East Main Street, and we seriously objected to their extending lines at that time. That is the objection in Exhibit No. 64. They were taking down poles and replacing them with new poles, putting up a heavier wire all the way through and extending their lines, which was contrary to our agreement. They were taking down some poles and replacing them with other poles. When they took down poles, they had to take the wire off. One does not have to take wires down to put new poles in, but it is necessary to loosen the wire, and then another pole is put in its place and the wire put back. They were stringing new wires a part of the way over the same route, and I objected to that verbally and in this Exhibit No. 64.

In Exhibit No. 65 the Power Company notified me that the changes contemplated were the repairing and reconditioning of the line, and we accepted that statement. They were renewing their lines contrary to the agreement. It was my duty to see that the lines were reconditioned and kept in good condition. The poles they were putting these on had been ordered removed. They were owned by the Telephone Company. The Ohio Electric Power Company stated that it had purchased the poles, but I was never shown the bill of sale. Those poles were very unsightly and located on Main Street, our best street, and had been ordered down. The poles were not in good condition. They were just stringing new wire. After that, I did not make any further demands on the Power Company as to that line but not because it had been put in good condition.

In Plaintiff's Exhibit No. 67, written by me, as director of public safety, to the Ohio Electric Power Company, Norwalk, Ohio, I required the company to move some poles and equipment along this street, while the repair of the street was under way, and part of the removal was done pursuant to my instruction.

The letter of September 22nd, Exhibit No. 64, refers to something that was contrary to the agreement that had been made between the attorneys.

I did not write Exhibit No. 64 under the terms of the ordinance of July 1, 1924. I did, however, as far as possible, when I considered it necessary, instruct the Ohio Electric Power Company to abide by the terms of that ordinance.

In certain instances, the Ohio Electric Power Company, while I was director of public service, removed a number of sections of its lines, pursuant to instructions from me. Sometimes I conferred with the mayor of the city about these various situations. Mr. Irvin looked after the lines. I do not recall that I ordered out many lines or poles, except instances where we had poles on streets that were going to be paved.

Plaintiff's Exhibit No. 68 is signed by Mr. Weidemaier, as mayor. That is his signature. I was very well acquainted with him. I may have conferred with the mayor on the situation, mentioned in that letter. I served under two mayors, but I do not remember that particular incident. I did have some talk with the mayor. This exhibit was directed to the Ohio Electric Power Company, because it was violating its agreement with the City of Norwalk. I knew that from time to time Mr. Irvin issued letters over his signature to the Ohio Electric Power Company instructing it to take down certain sections of its lines, pursuant to the ordinance of July 1, 1924. There were not many of those orders issued during my administration, if I recall. Mr. Irvin had no authority to go ahead on those lines, because I had no way of knowing just what lines had been abandoned. He was more particularly in touch with the actual physical facts. I had never given him blanket authority to go right ahead and issue orders. Mr. Irvin would bring the letters to me, when he sent them as a rule. In each instance, he would do that and receive my authority for sending them. After our agreement, it was not the practice for him to go ahead and see that the instructions contained in the letters were carried out. Mr. Irvin understood the instructions that no lines of the Ohio Electric Power Company should be disturbed. These instructions were given to Mr. Irvin at the time of the agreement between the attorneys, but I do not remember the date.

Plaintiff's Exhibits Nos. 63 and 66 refer to the ordinance of July 1, 1924, but Mr. Irvin did not have my specific approval to the removal of those sections of lines. We were issuing those in pursuance of the ordinance. He had my specific approval on those letters, and I think the Power Company took down some of the lines; I do not recall and would not say because I was not in close touch enough to know exactly. They may have taken some of the lines down.

"The Court:

What is the situation, did Mr. Irvin have authority to go ahead, or did he have to have his action approved or ratified under the law, Mr. Boxell? What do you say about it? Did Mr. Irvin have a right in his official position to go ahead and do these things, or did he have to have specific authority from the director of public safety and service?

Mr. Boxell:

No, I don't think he did, Your Honor. I would not think he would. He would have to have specific authority from the director of public safety.

The Court:

All right.

The Witness:

Those orders were not carried out." I said a moment ago that I thought some of these lines were taken down. Those letters were issued in pursuance of the ordinance; and it was my duty to enforce the ordinance. From time to time, I appeared before the city council of Norwalk and sometimes reported to them upon the discharge of my duties. I do not remember that the ordinance of July 1, 1924, was the subject of discussion before the city council. The council made these laws and we had to follow them. I have no recollection of ever giving the city council of Norwalk any report as to what I was doing under this ordinance, nor do I have any recollection of ever discussing my action in having certain sections of lines of the Ohio Electric Power Company taken down.

RE-DIRECT EXAMINATION

By Mr. Martin:

Judge Suhr was city solicitor during the time I was director. Exhibit No. 64 related to the replacing of the Local Telephone Company poles from East Main Street with new poles by the Ohio Electric Power Company. They replaced their old wires with new wires of heavier copper.

I recall meeting Mr. Kreider, the man from Sidney, who testified in this case, and it was when the Ohio Electric Power Company was replacing its old wires with new ones that I had a talk with Mr. Kreider and asked him to discontinue the work on the line.

RE-CROSS EXAMINATION

By Mr. Boxell:

In relation to the extension I have just mentioned, in connection with the line on East Main Street, I tried to find out on whose property the extension was located. It was a feeder out East Main Street and went to The Gallup-Ruffing Company. From there the Power Company built an extension to The Wisconsin Food Products Company, a portion of which was on private property. With the exception of perhaps one pole, it is on private property, but I would not be sure that even one pole was in the city street, unless I made a survey. The work on the line consisted of replacing poles and installing heavier copper wire.

Thereupon the defendant called as a witness in its behalf

CHARLES SUHR,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I reside at Norwalk, and have been engaged in the practice of law for thirty or forty years and maintain an office in the City of Norwalk, Ohio. For six years, I was Judge of the Probate Court of Huron County and since then served seven years continuously as city solicitor, assuming my duties as solicitor May 1, 1923, my term of office expiring January 1, 1930.

About October 26, 1927, while I was city solicitor, I heard that some poles on the south side of West Main Street in the vicinity of Church Street were being disturbed. Mr. Craig notified me of that fact by telephone,

between 7:00 and 8:00 o'clock in the morning. I met Mr. Craig either at my home or at the corner of Garden and Main Streets, and we went in an automobile to the house just west of the Presbyterian Church. We saw some men working and I recognized some of them as city employees. I am not sure about the others. We asked them what they were doing and they told us, and we insisted upon their stopping, and they immediately did so. I think they were in charge of Mr. Higgins. They stopped work, but I do not recall whether they went away. We went to the city office and met Mr. Webster, who just preceded me on the witness stand. We asked Mr. Webster if he had anything to do with the removal of poles on West Main Street. He said "No" he had nothing to do with it and did not know anything about it. We then went to the office of Mr. Irvin upstairs. He was not there. We did not see him. I did not see him for some time afterwards. I think that I had some conversation, regarding what was going on, with Mr. Pruner over in the court house. Mr. Pruner said he was going to file a petition for injunction and we said the men would do nothing further.

Aside from the quo warranto case commenced in the Court of Appeals and which went from there to the Supreme Court of Ohio, and in this case now pending on hearing, Mr. Craig had not represented the City of Norwalk at all during my time, except about seven years ago he represented the city in a case against New Amsterdam Casualty Company on the city treasurer's bond, about the time I came into office. Aside from that, Mr. Craig did not have anything to do with representing the city to my knowledge.

I attended all the council meetings of the city and do not think I missed one in seven years. I looked after all legal matters pertaining to the city, except the two cases in which Mr. Craig assisted. Mr. Craig did not resign that I heard of.

CROSS EXAMINATION

By Mr. Welles:

I expect I was in Norwalk January 3, 1930. I do not recall that I was out of the city; I might have been, but not very far. I do not remember that on that date, or at any time, Mr. Craig informed me that Mr. Boxell and Mr. Pruner had called upon him with a request that the city agree to allow the State Court injunction to remain in effect without contest, pending the outcome of this case

in the United States Court. I was not city solicitor on January 3rd, and Mr. Craig never told me about an interview between himself, Mr. Pruner and Mr. Boxell. I am positive of it. Mr. Bracy succeeded me as city solicitor. I did not continue to represent the city in the quo warranto case as special counsel, or in any other way, after my term of city solicitor expired. My understanding was that the case was closed.

Thereupon the defendant called as a witness in its behalf

M. G. IRVIN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Eversman:

I have lived at Norwalk, Ohio, seven years and five months. I am superintendent of the electric light and water departments of the City of Norwalk, and have been such for seven years and five months. It is an appointive office under civil service. My employment is continuous, subject to good behavior. My signature appears on Exhibit No. 62 (witness reads Exhibit No. 62). I dictated that letter and knew the contents. My reason for writing that letter was as a matter of safety, as a dangerous condition existed on West Main Street section of Norwalk. There were quite a few poles along the south side of West Main Street containing three actual pole lines on the same side of the street, very close together. Some of them were rotted off at the bottom. There were heavy trees along between the poles and the sidewalk and the tree limbs pressed against the wires, causing the poles that broke off to extend out over the street. About one year before the writing of that letter, a young man, who

was in an automobile, had been killed in that section, one of the poles leaning out far enough so that it struck his head and crushed his skull. That was July 4, 1926. From then on, until the Telephone Company abandoned their pole line, there were several slight accidents of trucks hitting the poles. The Telephone Company put in an underground cable construction through that area, wherein those poles were located, and I understood at that time that it agreed to take out its poles, provided it got permission to put a cable underground. Being in charge of the electric light department, and feeling the responsibility for the safety of the people from electric wires and poles, I investigated that district and found that there were quite a few poles that were in a dangerous condition, that should be removed, for the safety of human life. The poles, which were in a dangerous condition, belonged to the Local Telephone Company. I proceeded under the ordinance of July, 1924, to notify the Telephone Company that it had vacated those poles, and stated in that letter the provisions of the ordinance in that respect. The Telephone Company did not take down the 21 poles, referred to in the letter of July 30, 1927, Exhibit No. 62. Late in October, I proceeded to take the poles down, the ones that were vacated, and the ones which the Lake Shore Electric, or some other utility had cleared up as far as possible, removing nine or ten of the 21 poles mentioned in that letter. I did not remove any poles not referred to in the letter. The poles were removed about October 26, 1927. The day before, I went over the area, looked over the poles, and marked the poles which were to be removed and ordered the men to report at four o'clock on the following morning. I marked the poles by blazing them with a hand axe. These poles were all located on West Main Street, south side, between Church and Pleasant Streets. All the men, whom I had employed in the distribution department, six or seven in number, I ordered to report, and they reported the following morning at 4 o'clock. I ordered the truck driver to drive to this territory. I distributed the men along the pole line with orders to take care of the different parts of the work that would be necessary and proceeded to take the poles down. The poles, which I marked, belonged to the Local Telephone Company. I had its superintendent, J. L. Campbell, point out to me the poles which they owned in that area. That was done a few weeks prior to October 26th. After distributing the men and instructing them as to the work they were to do, I later

came along and told them to put the poles up on the boulevard, so that there would be no injury to traffic; I then told them that as soon as this work was done, they might get their breakfast and then report to work at the usual time. That was about 7:30. Then I went on out to the city's electric lignt plant and went about my duties, reporting back to the office at possibly nine or ten o'clock. The poles cut down were nine or ten in number.

Those poles, which were not broken off, we sawed off at the ground and I personally superintended the work of cutting down the poles or removing them. The poles, which were broken off, we had to hold up. They were held up by the wires and the trees. The poles, which we removed, were all very rotten at the ground. The ones we sawed off showed some wood, but it was very rotten. I would say 75 to 80 per cent of the original stock was rotted away. Others were rotted clear through. In my opinion, the continuance of those poles in the condition they were in, on the street, was a danger and menace to life and property. They were several wires of the Ohio Electric Power Company on those poles. I would not be able to say how many had contacts from Ohio Electric wires.

A contact is where an existing pole line has a wire of another company near enough to it to make it dangerous. A bracket and insulator are attached and the wires tied in to keep the wind from blowing it into the pole and to hold it firm, and space it. That is a contact. In the instance where these poles, which were cut down, had contacts with Ohio Electric Power Company, I removed the contact before taking down the pole.

After the poles were removed, the wires were tied in on cross-arms, which were on some of the poles. We took a hand iron and tied it to the cross-arm and suspended it to another pole or limb of tree to hold it up in the clear of any machine that might go in the driveway, or any person. When there were no cross-arms, we took a hand iron and tied the wires up, whichever was necessary to make a clearance over the sidewalk. I consider that method of handling those wires was perfectly safe to life and property. There were no transformers on the poles we took down. Among the 21 poles in the area, there were some transformers, but none on the poles which we removed. I did not take down any transformers at all.

The reason why I asked the men to report at four o'clock was that since the mailing of that letter to the

Telephone Company I had strong information—rumors you might say—through employees, that they were going to patrol that territory and make trouble if we attempted to put that ordinance into effect. Also, we were very busy at that time, and carried a very small force of men; and that is really one reason that dragged us along over the 30-day period. We did not have time to get at it. Those were two causes that made me get the men out early in the morning and expedite the work and get it done. Although this letter of July 30, 1927, Exhibit No. 62 refers to 21 poles, I did not remove all the 21 that morning, because some of them had Telephone Company drop wires, service wires, attached to go into the house from the other side of the street where the underground line was. We did not remove them. Some of them had Ohio Electric transformers on and we did not remove them. A couple of them were supporting the Ohio Electric wires in a way that we could not make the wires safe if we took the poles down. There was no equipment of the Telephone Company on the nine or ten poles which we removed.

After writing the letter of July 30, 1927, Exhibit 62, I did not have any further talk with the director of public service about these poles referred to in the letter.

(Witness handed Exhibits K to O.)

Exhibit K is a photograph taken November 11, 1930, of an Ohio Electric Power Company pole and transformer, 2200-volt primary line, secondary service, located on East Main Street, in front of 200 East Main Street. I was present when these pictures were taken.

Exhibit L is a photograph of Ohio Electric Power Company pole in front of the residence known as 208 Whittlesey Avenue, showing a single-phase primary 2200-volt line, and a pole broken off at the bottom, leaning in the trees.

Exhibit M is a photograph of what is known as a transformer fixture on Carey Place, in the rear of the Norwalk Foundry, showing the Ohio Electric Power Company power installation for that foundry, with their primary lines and secondary lines; and also shows a pole owned by the City of Norwalk Electric Department. The foundry pole is the two poles here fastened together, and the cross-beams upon which are hanging cross-arms; and the higher pole is the City of Norwalk pole line, showing their primary, secondary and cross-arm. I mean primary and secondary wires. The two lower poles belong to the Ohio Electric Company and the taller pole belongs to the City of Norwalk.

Exhibit N is a photograph showing Ohio Electric Power Company's poles on West Main Street between the Universalist Church and the Telephone Company's building. It shows poles, cross-arms and three-phase primary, about 15 feet above the street level.

Exhibit O shows two poles of the Ohio Electric Power Company. The first pole, or the one nearest the camera, is the pole which is leaning over West Seminary Street at the corner of West Seminary and Benedict. It carries their primary and secondary lines. The farthest pole we can see, between the nearer two poles, is the Ohio Electric Power Company pole located on the corner by the jail, upon which is a cross-arm owned by the city, which was put there to support the city wires, wherever they come across to the highest pole or the middle one in the picture. That is a joint contact.

Where two pole lines exist along the same side of the street and are in conflict with each other, then it is necessary for the wires of the lower pole line to be made fast to the poles of the higher pole line, in order to keep them from burning the pole off, or injuring the linemen or citizens. The joint use of poles between the city and Ohio Electric Power Company is in the interests of safety. The Utilities Commission, in their Administrative Order No. 72, have defined pole lines as being in conflict, when they are paralleling each other, and near enough to each other that the supporting structures of one pole line, falling, will make contact with the wires of the other pole line.

I heard the testimony here of one of the witnesses to the effect that Ohio Electric Company had joint use of 70 of the city poles, and that the city had joint use of 50 of their poles. That use is parallel to the situation which I have just described, with reference to Exhibit O. Fifty of Ohio Electric poles and 70 of the city poles were so used.

On Exhibit L the pole is leaning out of plumb, possibly six feet, over into the trees, bringing the primary wires in against the limbs of the trees; and very little moisture would be required to burn the wires down, and children or citizens coming into contact with those wires might be instantly killed.

Exhibit K shows the pole leaning considerably over the street, and shows that the construction on that section of East Main Street is the same construction that was put up 20 to 25 years before. The type of insulators used on that pole, the transformer, the method of

construction, are all evidence to me that that line has not been rebuilt in 20 years.

On Exhibit M, the transformers are obsolete. Those transformers have not been manufactured in the past 20 years, and the depreciation figure on that should be close to 100 per cent.

On Exhibit N, I want to show the distance the primary or 2200-volt lines are above the street, by a comparison with a street light fixture, which is 11 feet from the top of the globe to the street line. The Utilities Commission on safety rules require 2200-volt lines to be 20 feet above any thoroughfare.

CROSS EXAMINATION

By Mr. Welles:

July 1, 1924, I had been in the employ of the city as superintendent of electric light, power and water, one year and one month. I had something to do with the preparation of Exhibit No. 38, the ordinance passed July 1, 1924. I did not prepare the ordinance. I prepared the conditions covering construction. The ordinance embodied what I suggested along those lines as applicable to all electric light, power and telephone companies, who would use the streets from then on. I was present at the meetings of the council at which this ordinance was under consideration and the attention of council was directed to what companies there were that were using the streets at that time. Mr. Ruffing, a member of the council, did that. The companies that were then on the streets were the Lake Shore Electric Company, the Local Telephone Company, The Cleveland & Southwestern, and a line known as The S. N. & M.

After the ordinance of July 1, 1924, was enacted and became effective, from time to time I served notices on the electric light and power companies, telephone company, and trolley company with reference to the provisions of the ordinance. I served such notices whenever I found conditions which appeared to me to warrant it. It was my duty as superintendent and as a citizen of Norwalk to take such action for the safety of the other citizens. I was a subordinate of the director of public service and public safety but never had any instructions from him to issue any orders. I did not receive any instructions from him that I had any duties under this ordinance.

I arrived at the conclusion that it was my duty to proceed to serve notices, because I was the only one con-

nected with the city that had any knowledge of the conditions and how to remedy them or the danger of them.

I was acquainted with the provisions of Section 10 of the ordinance of July 1, 1924, which reads as follows:

"Any extensions or constructions of existing conduit conditions not executed in conformity with the above shall be condemned and if not disconnected and removed within thirty days from the date of such condemnation, shall be disconnected and removed by the city under the direction of the director of public service and the material sold to cover costs of such work."

I did not consider myself director of public service but thought it was my duty to act as a matter of safety. I had a conversation with the director of public service about an ordinance, with reference to the electrical department. I never had any conversation with the director of public service about this ordinance, nor as to my duties under this ordinance of July 1, 1924. I had no conversation with the director of public service upon that subject:

Relative to who should give notices under Section 10 of the ordinance, there was one case where I asked the director to have the chief of police take up a matter with the foreman of The Cleveland & Southwestern Company on a line extension, and the chief of police went down there and notified them they would have to have a permit before they went ahead and did the work. That is the only one of my knowledge that I remember. That is the only matter that I ever took up with any director of public service. I never had any general instructions from the director of public service. My practice has been to just go ahead and execute the ordinance; that has been the practice there in Norwalk since the ordinance went into effect.

I don't recall ever having had any discussion with any mayor of the city about this ordinance. I never went before the council but was in council when some discussion came up wherein I explained some work, or something, I don't recall what that was.

I have seen Plaintiff's Exhibit No. 62 before. I don't recall of talking this over with the director of public service. I recall putting the letters on his desk for him to sign or to do with as he pleased. His office is downstairs in the same building, but I recall no conversation about it. I prepared Exhibit No. 62 myself, but do not remember whether I attended to the mailing of it. I probably caused Exhibit No. 62 to be mailed to the Local Telephone Company. I do not recall having

caused another paper like it to be mailed to the Ohio Electric Power Company. I do not want to say I did not. At the time I prepared Exhibit No. 62, I had made an investigation as to what wires were on the 21 poles, mentioned in it. I do not recall that I made any notation as to the number of poles which had Ohio Electric Power Company's wires on them. I think there were a couple of the 21 poles which did not have wires of Ohio Electric Power Company attached. I would not say that 19 of the poles did have Ohio Electric Power Company's wires on them. I do not know how many had.

I testified that there was an old style transformer that had been of the vintage of about 20 years ago, referring to Defendant's Exhibit N. That type of transformer was in general use by Ohio Electric Power Company in the majority of cases. They have other types of transformers, but this type was used in the majority of cases.

This is my signature on the letter designated Plaintiff's Exhibit No. 51.

I did not have specific authority to write the letter, but took it upon myself to use the language "I am authorized by the director of public service." When I wrote that letter, I had in mind the enforcement of the ordinance of July 1, 1924. The letter is dated May 14, 1925.

"The Court:

You do not claim, do you, Mr. Eversman, that the plaintiff here did not comply substantially with the provisions of that ordinance of July 1, 1924?

Mr. Eversman:

No, Your Honor, we do not claim that. Whatever there is in that, Mr. Boxell, you can just save yourself cross examination. As I recall it, with very, very minor exceptions, you complied in every way with every letter, the subject matter of which related to the ordinance of July 1st, 1924; and the defendant admits that.

Mr. Boxell:

That is right."

I affixed my signature to Plaintiff's Exhibit No. 62 and prepared the letter. It is correct that the practice was that I executed the ordinance, without consultation with the director of public service. After the issuance of the letter, July 30, 1927, Exhibit No. 62, I received no further instructions from Mr. Webster, director of public service, with reference to the situation in that letter. Whatever was done after that, I did on my own initiative and I received no order from Mr. Webster sub-

sequent to that time, recalling the instructions contained in Exhibit No. 62. I testified that there are numerous places where lines of the city are on lines of the Ohio Electric Power Company and lines of the last named company are on city poles, and it is true that there are numerous places in the city where the same line of poles, for some distances, will support lines of both the city and Power Company.

In October, 1927, before the day the poles, which I have testified to, were removed, I marked 10 poles and took down ten, 9 or 10.

In Plaintiff's Exhibit No. 62, I mention authorization for the removal of 21 poles, but I did not undertake the removal of all the 21 poles mentioned in this letter. The 9 or 10 poles, which were removed, had Ohio Electric Company's wires attached to them. They strung their wires on them, but I believe there were two of them that had no wires on at all, not even a contact. Seven or eight were in use by the Ohio Electric Power Company. These 9 or 10 poles were vacant, in reference to the telephone company. They bore no lines of the telephone company. The telephone company put their telephone wires in conduits on the other side of the street. At the time I removed the poles, about 8 of them bore lines of the Ohio Electric Power Company, and two were vacant. Some weeks before the removal of the poles, I had a talk with the superintendent of the telephone company, but had no similar talk with anyone representing the Ohio Electric Power Company, prior to the taking down of the poles, but prior to that time I knew that these poles had on them lines of the Power Company.

My usual time for having men report for work was seven to seven-thirty o'clock in the morning. The reason for calling the men together at four o'clock was because I heard rumors through employees that the telephone company was going to patrol that line and make trouble, if we went to remove those dangerous poles. The other reason was that I had a lot of work on hand and I could not go into it in the middle of the day. It would hinder our other work. This job required two or three hours' work. The men who took down the poles quit at the same time in the evening. No transformers of the Ohio Electric Power Company to my knowledge were removed. It is possible that some may have been removed that I did not know about. No transformers were on any of the poles that I had taken down. The Ohio Electric Power Company probably had two or three transformers in that area. I hardly think that one

transformer was taken down that I did not know about, but it is possible, of course. A number of the wires of the Ohio Electric Power Company on the poles, which were taken down, were on cross-arms and the cross-arms were attached to the poles which I took down. The cross-arms remained suspended in the air attached to the wires.

In the several letters, sent by me to the Ohio Electric Power Company, possibly I made some statements that were untrue and there is no question in my mind but what some of those letters, where I stated I was authorized by the director of public service, were not specifically authorized by him, and that I was not authorized by him to bring the matters to their attention. That would be untrue. I talked with the director of public service about some of the letters. As to my statements in Plaintiff's Exhibit No. 63 being true or untrue, I do not remember one way or the other on it. The director of public safety and service may have specifically authorized me to write Plaintiff's Exhibit No. 63. I do not remember whether the statement contained in Plaintiff's Exhibit No. 66, that the director of public service and safety had authorized me to do certain things, is true or untrue. I may have had the specific authorization of the director of public service and safety to write that letter. That is so, with reference to all the letters, in which I made the same statement. I can not state whether or not I was authorized in any particular letter. It is possible that in the case of every one of these letters, wherein I make the statement that I had the specific authorization of the director of public service, that I may have had his authorization. At least, as to some of those letters, I was not authorized and as to some of them I was authorized, I can not tell which, that is, the execution of the letters. I was not authorized by him to execute or to carry out the provisions of any of them. I do not recall of the director of public service and safety ever withdrawing his authorization after the date of the particular letter.

In connection with the examination of Mr. Irvin, the photographs, Exhibits K, L, M, N, and O, were offered in evidence by the defendant.

"Mr. Welles:

We object to each separately, if Your Honor please, on the ground that it is of no importance whether there are isolated instances in which the poles or wires of the company need attention or correction; and that the evidence has no bearing upon the rights of this plaintiff. If

it shows anything it merely shows that Mr. Irvin had not performed his duty in requiring the operating company to correct conditions."

Thereupon, the following statement was made by the court:

"The Court:

As to Exhibit M, Mr. Welles, he testified that the transformer shown in that photograph is in general use by this company; and that it is a very antiquated style of transformer. It has some bearing upon the case. The others will be received merely for illustrative purposes. It is not of any moment except to illustrate the testimony. But Exhibit M is admitted generally, over an exception noted; K, L, N, and O are admitted merely to illustrate the testimony of the witness.

"Mr. Welles:

Note our exception.

"Mr. Eversman:

We are calling, Mr. Irvin, Your Honor, to testify on another matter.

"The Court:

All right."

TESTIMONY OF M. G. IRVIN
(continued)

DIRECT EXAMINATION

By Mr. Eversman:

Prior to my seven years' service as superintendent of electric light and water department of the City of Norwalk, I was employed by Henry L. Doherty Company in their Ohio Public Service property at Elyria, for about 7 years. The last four years of my service, I was superintendent of transmission and distribution, and for the first three years I was chief electrician. Prior to my employment with the Doherty Company, I was employed by The Willys-Overland factory in Elyria as first electrician; and prior to that I was with The Cleveland & Southwestern Railway Company as electrician; and prior to that I was an electrician for Carnegie Steel Company at Newcastle, Pa.; and prior to my employment with Carnegie Steel Company I was in the electric contracting and house wiring business at Point Marion, Pa. Prior to that time, I was at Elyria as factory electrician for Dean Electric Company. Dean Electric Company was engaged in manufacturing telephones, switchboards, automobile horns and ignition systems. I have

been engaged practically all my working life in the electrical business.

"The Court:

Is this witness going to fix values?

Mr. Eversman:

Yes, Your Honor.

Q. Give us a general description of the generating plant of the City of Norwalk?

Mr. Welles:

Objection, on the ground that what he says is there has no bearing upon any issue in this case.

The Court:

I think that is so, Mr. Eversman, is it not? There is no issue in this case which requires the court to compare the two systems in any respect that I can see.

Mr. Eversman:

The bearing it has in this case, I think, is this, if Your Honor please, that the claim may be made—and there is certainly the statement in the petition, in the bill—that the plaintiff here, that is, Ohio Electric Power Company, has property here of considerable value; and I think the petition states what the property is worth; and that if they are ousted from the streets of Norwalk, they will suffer great injury.

The Court:

Practically wipe out any value it might have.

Mr. Eversman:

Yes; and the purpose of this is to show, in the first place, if they have any franchise at all, which of course we deny, the franchise is not an exclusive one; and that the plant of the city is very much larger than this Ohio Electric plant, and serves substantially all of the people, and can serve those that are now being served by the Ohio Electric.

The Court:

I do not think it is necessary for you to go into that in any way I can see. We can assume that is all so. They have four hundred and some customers.

Mr. Eversman:

The fact of competition certainly has some bearing upon value, if that becomes an issue in this case.

The Court:

I do not see that.

Mr. Eversman:

If the question of value were not an issue in this case, then I would say this line of evidence is entirely immaterial. Personally I don't think it has anything to do with the case. We have not brought it into the

case. The plaintiff brought into the case the value of their plant.

The Court:

If there is anything in what you say, it is so remote, it is unimportant. The question is the value of this plant.

Mr. Eversman:

I don't think that is in issue in this case, the value of this plant.

The Court:

It certainly is in issue on the amount in controversy. Do you claim anything further for your testimony as to the value of your plant?

Mr. Welles:

The evidence establishes the amount in controversy; establishes, of course, that there will be a loss of security to the plaintiff bankers under the trust if the value of the plant is destroyed.

The Court:

Do you claim anything further for it than that?

Mr. Welles:

No, Your Honor.

Mr. Eversman:

Then he does say it has a bearing on the value of the bonds.

Mr. Welles:

It has a bearing upon the question whether our security for the bonds is affected or not by what the city is proposing to do.

The Court:

You have got, first, the value of the plant. The next step is of course the value to the mortgagee here as security.

Mr. Eversman:

If this court is interested in the determination of the value—we are talking value now—if that is in issue in this case, then certainly the kind of competition this plant has is a material factor in determining value.

The Court:

Well, it is so remote, if that is all Mr. Welles claims for his testimony, there is no point in going into it that I can see. Your plant might burn down tonight.

Mr. Eversman:

I assure Your Honor that we have insurance.

The Court:

Mr. Welles' position now is that the matter of value of this plant has been gone into only for the purposes of establishing the jurisdiction of this court.

Mr. Eversman:

If that is so, if that is the construction of it, I am now satisfied.

The Court:

That is so, Mr. Welles, is it not?

Mr. Welles:

I think it is competent for jurisdiction; it also goes to the question as to the right to equitable relief.

The Court:

What do you mean by that?

Mr. Welles:

We are threatened with a loss of part of our security.

The Court:

That is still a matter of jurisdiction. That is all that is claimed for it."

Ohio Electric Power Company has 410 poles in the City of Norwalk and 400 customers. The kilowatt capacity of the Ohio Electric plant is 200 kilowatts, and the present demand is about 160. I have made an inspection of the Ohio Electric plant for the purpose of determining the cost of reproduction new and the cost of reproduction less depreciation of that plant, and have prepared an exhibit of my estimate.

"Mr. Welles:

I may say that we object to any opinion by Mr. Irvin on this subject, on the ground that he has not shown himself qualified.

"Mr. Eversman:

I think he is qualified.

"The Court:

I am not saying he is not. The evidence shows he has been in the electrical business a long time. He may not know a thing about value."

I am familiar with the cost of all items of property that go into a generating and distribution system of an electric plant and with the elements of cost that go into a transmission system.

As superintendent of the light company in Norwalk, I purchase all material for them, and in connection with that work it is necessary for me to keep informed from day to day as to the values of items of property that go into an electric distribution plant, and I am so informed.

The Public Utilities Commission of Ohio made an inventory of the Norwalk city plant and I assisted them in so doing.

"The Court:

Do you care to cross examine him, Mr. Welles, on

this point? He shows prima facie, some knowledge of values.

"Mr. Welles:

No cross examination on that subject.

The Court:

All right. You are reserving your right to later.

"Mr. Welles:

We still make the objection that he is not qualified.

"The Court:

He has shown some qualification.

"Mr. Welles:

Exception."

Exhibit P is a tabulation showing reproduction cost and reproduction less depreciation and was prepared by me.

"Q. What did you find the cost of reproduction new of the plant of the Ohio Electric Power Company in Norwalk to be? A. $17,905.60.

"Mr. Welles:

Objection, on the ground previously stated.

"The Court:

All right. It is overruled. Save your exception.

"Mr. Welles:

Exception."

That is cost of reproduction less depreciation.

"Q. And what is the cost of reproduction new of this plant?

Mr. Welles:

The same objection.

The Court:

Overruled. Save your exception.

Mr. Welles:

Exception.

Witness:

There are different percentages of depreciation. I will have to total that.

Q. It is given just above there, is it not (referring to exhibit)? A. $34,027 plus $500 for land."

In this Exhibit P, there is no inventory of transmission line, and I did not attempt to evaluate it. The towns and villages, other than Norwalk, supplied by this transmission line, are Birmingham, Kipton, Florence, Henrietta, East Norwalk, and a rural line called The Farmers Mutual Light & Power out of Milan, which covers territory from Berlinville, possibly seven miles in length.

The percentage of the total load carried by this transmission line for the load of the City of Norwalk

is 50%, that is 50% of the load on the transmission line supplies Norwalk; 50% goes into these other towns.

Twenty-five or thirty customers of the Ohio Electric Power Company are served with a three-wire single-phase service, and the same number, 25 or 30 of its customers, are supplied with a three-wire, three-phase service, and the balance of the customers are two-wire, single-phase service, commonly called 5-ampere service.

CROSS EXAMINATION

By Mr. Welles:

In ascertaining how much of the load of this transmission line is used for Norwalk and how much for other purposes, it is a matter of estimation over my experience of the type of customers served on both lines, both sections of the line. It is an estimate. I assumed that there are 400 total customers, power or residence customers. I do not know how many customers were on the line outside of Norwalk. I never had an exact figure on that. I have a fairly good estimate based upon the number of customers they have. I do not know how many customers they have to base an estimate upon. Birmingham has a certain population. I do not know how many customers this company has outside of Norwalk served by this transmission line. I have taken the populations of towns and there is some ratio of customers to populations. I don't remember how many customers I estimated there were in the country. At the time I made that estimate, I took the populations of the territories served and used the diversity factor—that is common practice—and arrived at the number of customers. I made that estimate at the time I made an appraisal for this valuation of the other property in 1927. I have recently gone over the subject in the city, but not on their transmission line. They could not have increased what they have out along the transmission line very much. I do not know whether it is diminished or not. They have four power customers in Birmingham, a couple in Kipton and as compared to power customers in Norwalk their demands are very low. I am not in position to deny that there are twice as many customers in Norwalk as there are long the rest of the line. There are more power customers in Norwalk than there are in any place else on the line all combined, and having a larger demand, larger industry.

I would not regard the month of December as a fairly typical month in the use of electricity; October or

April are typical months for the year, to use as an average for the year. December would be a heavy month, but not necessarily for both light and power. Many factories close near Christmas for two weeks' inventory. If it appeared that the total consumption of power in the Norwalk district, consisting of Norwalk, Kipton, Birmingham and Vermilion, to the Mutual Light & Power Company, and to the Wakeman —— Electric Company, in December, 1929, was 68,024 kilowatt hours, and in Norwalk alone, during the same month, it was 45,518 hours, you could hardly tell whether that was a normal condition or not. If you take a year's figures and average it up, you might find that the condition would be different. I would not want to change my estimate of 50% just based on that. It would not be enough for me. Ordinarily, the power demand is greater in Norwalk, proportionately, than along the line. The 68,000 total included Norwalk. If I had the figures, I probably could figure out the exact percentages. I do not claim I had the data and I did not have any figures from which I could make any accurate determination as to how much was used in Norwalk and how much used outside. I used 80% depreciation on the brick building. I used that percentage of depreciation, because the building was built in 1895 and has not been maintained. I thought it was a very conservative estimate. The appearance of that building, or the sale price of that building, as it is right now, is zero. I have never had anything to do with the purchase and sale of brick buildings of that character, but I have built brick buildings. I have not had occasion to appraise a plant for a prospective purchaser. Two per cent a year of depreciation is what I use on our plants that I have charge of. I would not say that that would be usual. The percentage of depreciation ordinarily used in determining the value of engines, boilers, generators, regulators and transformers is six to eight per cent a year.

I said the building and equipment is depreciated 80%. If an equipment is in operation, it has a value in operation and you could not depreciate it 100%; it was worth nothing removed from the foundation or from the building, only scrap value, which would be absorbed in removing it. I followed the method I have always used in my own work, which I would use if I were manager of that property and was making a valuation of it for sale or for figuring the return on the investment. I used my own individual method for applying depreciation. I do not know what the accepted rule would be on property

in that condition and I have not used any accepted rule. As to the cost of a 150-horsepower Sterling boiler, new, at this time, I have data on that. I purchased a 511-horsepower boiler three years ago, and had data in my office covering the cost of the different sizes of boilers of that type. I got that data from manufacturers of boilers: The Union Iron Works; Casey-Hedges Company; Erie City Iron Works, and Babcock & Wilcox. I had a quotation for a 150-horsepower Sterling boiler, a three-drum, vertical tube boiler, at $8,000.00 That figure was put out by the Babcock & Wilcox Company, the manufacturers of boilers. I was installing a 511-horsepower boiler. When getting information with reference to new installations and arriving at what size boiler is necessary for a particular use, you get prices on the different sizes, and the different types of construction, and apply the type of equipment consistent with the money you have available for your company. I did not ask them for a quotation on a 150-horsepower boiler, but they certainly gave it to us. I do not have it with me, but possibly could get it and produce it.

In referring to my memorandum, Exhibit P, and to the item "Generating Station Equipment," I did not obtain quotations from the manufacturers for each one of the items of equipment there listed. We have a price on transformers but no other items. I estimated the price on the equipment. I estimated what a manufacturer would charge for them, without making any effort to find out whether that is the price at which they are quoted. I did not include anywhere in my valuation figures anything for the cost of obtaining customers.

Ohio Electric Power Company has upwards of 400 customers, and it is a fair thing, in undertaking to evaluate an electric light and power plant, to allow something for the cost of obtaining the number of customers that it has. There are other items of going concern value besides the cost of obtaining customers that I have not included in my evaluation. There are engineering items and items of that nature, interest on the investment while under construction, and these things are omitted from my values. I did not ascertain the age of each item under "Generating Station Equipment." The voltage regulators were installed since I was in Norwalk, and that is probably the only item that I actually know the age of.

RE-DIRECT EXAMINATION

By Mr. Eversman:

I was here when Mr. Insull testified that the boiler and the engine were installed in 1895. In making up this exhibit, I got my original figures in a valuation I made in 1927, covering the equipment and material and all that; then the other day, Saturday, I revised it to a certain extent, using Mr. Insull's figures, in reference to pole line miles of primary and secondary, and checked that, Saturday, with actual conditions. I, also, estimated from looking at the building that it was a 100 by 50 by 16 feet in size; and in that way I arrived at the figures with the revised estimate I have made. I, also, took into consideration the age, which Mr. Insull gave of the equipment, which was in accordance with information I had had from the employees of the company in 1927. It all lined up; his information on age lined up with what I had originally taken.

RE-CROSS EXAMINATION

By Mr. Welles:

I do not know whether my original estimate, the one I made before I revised it last week, is here or whether it is in Norwalk.

Thereupon defendant called as a witness in its behalf

WARREN D. SPENGLER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Eversman:

I live at Hudson, Ohio, and my present employment is with The H. K. Ferguson Company, of Cleveland, engaged in a line of business as engineers and builders of industrial properties, including power plants and so forth. For the last 30 years I have been in engineering, general engineering; and have designed and built a number of transmission lines, varying in voltage and electrical distribution from 2300 to 130,000 volts. The power plants, practically all of them, were larger than this one here at Norwalk. I am thoroughly familiar with power plant construction and power plant operating cost. I am a graduate of the Massachusetts Institute of Technology and received my engineering education there. I have been in the employ of The H. K. Ferguson Company six months. H. K. Ferguson and my own organization, which was in existence for 11 years, merged; so it has been only six months that I have been identified with the Ferguson Company. I had an organization of my own, operating under my own name, an incorporated company. It was in business 11 years. We sold out entirely to H. K. Ferguson last May and I joined his organization. When I was engaged with my own firm, the business was just exactly the same, electric power plants and transmission lines for utilities and for industrial plants. From time to time I have installed power and light plants, electrical distribution plants, and I am familiar with the cost of reproducing electrical plants and plants of the character of the one in Norwalk. Last Saturday I made an inspection of the property of the Ohio Electric Power Company in Norwalk. We passed through the town on the various streets looking at the distribution lines in the town, observed the condition, the type of construction, the apparent age of the equipment and material; and, also, a brief inspection of the power plant. We traveled along the line of the transmission, where it was possible to do so along the highway. We started from Norwalk and ended at Oberlin, a distance of about 25 miles. We started in the morning, shortly before noon, and it was half past four or five when we finished, prac-

tically a day. I made an estimate of the cost of reproduction new, and the cost of reproduction less depreciation of a part of the plant of the Ohio Electric Power Company, the distribution plant in Norwalk and the transmission system. I only made two estimates, one for the transmission between Oberlin and Norwalk, and the other for the power plant. I did not have the time to do more than that. I reduced that estimate to writing and this, Exhibit Q, is a copy of it.

"The Court:

Are you marking the sheets separately or all together?

The Clerk:

All together.

Mr. Eversman:

Exhibit Q, consisting of two pages, I suppose.

The Court:

All right."

In arriving at the cost of reproduction new of the transmission line, I will say we built a line several years ago, 22,000-volt, three-phase, on 35-foot poles, with spans that were 200 instead of 300 feet, No. 4 copper. I corrected for the price of copper on the basis of the time that was built, and, as I recall it, the cost was $1850 a mile. With the present cost of copper now, that price is too high. It could be built at considerably less. I put that in there at $2000, to cover easements on private right of way, which is ample. I arrived at the item of $5540.00 for a substation on the original report of Mr. Insull.

The Exhibit D is the report of Mr. Insull, to which I refer. With reference to my figures of $19,250.00 for the generating station, I went to my own records of power plant costs, and built up a total cost of a plant that would consist of a 200-kilowatt generator, and a 150-horsepower boiler, a switchboard similar to the one there, with a stack, etc., and building, and arrived at $19,250.00.

In respect to the next item of $30,154.00, under the heading "Distribution," I left that just as it is, I had no time to make any estimate of that. I would say that that figure is amply high.

As to the items of property listed under "Miscellaneous" at $4800.00, I left that as it was, the same as Mr. Insull's figure. That is, on the substation, I accepted Mr. Insull's figures.

"Q. I take it, then, from this Exhibit Q, that you found the cost of reproduction new to be $109,744.00,

basing the estimate, in parts, as you have testified, on Mr. Insull's figures? A. I observe an omission there, in that generating station. That $19,250.00 was the cost of the equipment. There was an addition to that. That is my error there. There should be an addition to that. That should be $33,800.00. That is a typographical error there. That $19,250.00 should be $33,800.00.

"The Court:

The $19,250.00 should be $33,800.00, is that right?

"The Witness:

Yes, sir, that is right.

"Mr. Eversman:

The $19,250.00 should be how much?

"The Witness:

$33,800.00. I will tell you how that is made up. The $19,250.00, if you take Mr. Insull's report on page 4, covers the equipment; and then the building, I have allowed reproduction new at $12,300.00, wiring at $750.00, which is Mr. Insull's figure, and land at $1500.00, which is his figure, that brings the total to $33,800.00. There was an omission there on my part.

"Mr. Welles:

That changes the total how much then?

"The Witness:

I will tell you in a second. $14,550.00 more makes a total of $124,294.00."

In Exhibit Q, I have depreciated the transmission lines 75% and arrived at those figures by inspection. The condition of the actual poles themselves is very, very poor. A great deal of the line should be repaired, if it is going to last much longer; and a great deal of it has been repaired and is in need of further repair. I examined a number of stub posts that supported the original poles. They are in bad shape; and the poles themselves, those that have not been repaired or supported, are in pretty bad shape. There are a number of new poles, and it is just a question, in a hurried inspection, about what kind of a judgment to make regarding a situation of that kind. An accurate estimation would probably bring that below 25% as to actual reproduction new, less depreciation.

I depreciated the substation 85%, exactly as it was in the original report, Exhibit D, I think you mentioned. I depreciated it but 15% and have not modified that figure at all. I did not have an opportunity to inspect the substation and for that reason adopted Mr. Insull's figures. As to the generating station, I placed the building at $1,000, and the land at $1500, which was the orig-

inal figure, and nothing for the equipment. The building is in very bad repair, very poor condition. The value of the land is exactly as it was in the original estimate, and I made no investigation as to it. I arrived at the total depreciation of equipment, because the plant, as I understand, is 35 years old, and not worth anything due to obsolescence and depreciation. I made a personal inspection of equipment and took its value on the basis of the cost of reproduction, less depreciation. The generating station is antique; it has outlived its usefulness; I would hesitate to recommend any client of mine to spend any money on it.

In arriving at my depreciation of 50% on distribution, I made an inspection, noting the new poles, the old poles, and the size of the old poles, the condition of the wiring, and the overhead construction, and would say that 50% is plenty high enough for a percentage of the cost of reproduction new.

The miscellaneous item, cost of reproduction new, less depreciation, $3,125.00, is exactly as it appears in the original report. I made no inspection of those items. Were I called on, as a consulting engineer, to place a value on this property, for the purpose of its purchase by a client of mine, in addition to the reproduction cost, less depreciation, I would take into account its ability to earn money on a given investment. That would depend upon the customers, the rates, the gross returns, the operating expenses; and that would determine the amount that could be paid for a property of that kind. I observe that in Mr. Insull's estimate, he places the cost of reproduction new of the plant at $164,000.00.

"Q. If the kilowatt demand of a generating distribution plant were 160 kilowatts, and the total cost of installing such plant new were $164,000.00, what, if any, comment have you to make as to the relationship of the cost with the demand?

Mr. Welles:

Objection, if the court please, on the ground that it does not lie in the mouth of the city, which for years past has prevented this company from developing its plant, extending its line, acquiring new customers, now to say because they have by that means brought about this disproportion between the amount of the demand and the capacity of the plant to serve, that by so depreciating the value from that standpoint, they can bolster up their own rights as against this mortgage holder.

The Court:

Well, it does not get very far. We will let him answer it.

Mr. Welles:

Note an exception.

The Witness:

The investment is entirely too large for the work it has to do in supplying 160 kilowatts. That is at the rate of $1000 per kilowatt, practically; that is a great deal too much.

Q. What is the average relationship between kilowatt demand and cost new?

Mr. Welles:

The same objection and exception.

The Witness:

The usual cost as averaged will vary around $300.00 a kilowatt; sometimes lower than that; sometimes more than that, but not very much for a successful plant.

Q. From your inspection of this property, both the property in Norwalk and the transmission lines, are you able to determine from that inspection whether or not this property has been normally maintained?

Mr. Welles:

The same objection.

The Court:

Overruled.

Mr. Welles:

Note an exception.

A. I would say that the property has been very poorly maintained."

I arrived at the conclusion that the property has been very poorly maintained by an inspection of both facilities, the facilities of the town, the municipal plant, and the Ohio Electric Power Company facilities. There is no difficulty at all in picking out the Ohio Electric Power Company lines, with very few exceptions, where they have put in new poles; but the balance of the equipment is in very poor repair.

CROSS EXAMINATION

By Mr. Welles:

In determining the reproduction cost new, I assumed a building of the same cubic content, as those which are there. I assumed a building of the same identical size, at 15c per cubic foot. I have had experience as an operator of an electric light and power plant about 15 to 18 years ago as acting chief engineer of three different

properties at one time. In that position, the systems which I had charge of did not have their main source of power from other than their own plants. We were supplying power in that particular case. I understand the reason that the steam power plant is at Norwalk is to carry the load; that whenever they have an interruption in the transmission lines, the conclusion is it has to. It should have the ability to do so. If you have a 160-kilowatt load as a maximum demand, and you have a 200-kilowatt engine, it should be able to carry the load, but whether it does or not is a question of who you have as an operator. The equipment in its present condition will carry the load; whether it will be successful, whether it will be subject to interruptions due to a breakdown, or lack of repair, I can not answer; but it should, based on electrical capacity, be able to carry it.

"Q. From the standpoint of an operating man is it your opinion that a plant which is capable of carrying the entire load of the system in Norwalk upon occasions when its usual source of supply gives out is of no value at all? A. You are talking about a different value. We have been talking about reproduction costs, less depreciation.

"Q. I am asking you this question, if you will just listen to it and answer it.

(Question read.)

"The Witness:

Will you tell me what you mean by value?

"Q. Worthless. A. I don't understand what you mean by value.

"Q. I am talking about dollars and cents. Is it worth no dollars and cents? A. Do you mean can it earn its way?

"Q. I did not ask you that. A. That is dollars and cents.

"Q. I asked you whether it is of no value—something that should be wrecked and thrown away under the circumstances? A. I cannot understand your term of value. If you will define that, then—

"Q. You cannot answer the question as I put it? A. Unless you definie what you mean by value.

"Q. I define value by dollars and cents. A. I would say this: A dollar and cent definition of value is how much can it earn; and if it enables you to supply your customers and keep service there, then it is worth something; but how much it is worth depends upon how much it will earn.

"Q. Whatever your views about that may be, then

you will agree, will you not, that, to the Ohio Electric Power Company, or to one holding the mortgage upon the assets of the Ohio Electric Power Company, the plant and equipment, generating plant and generating equipment in it, are of value? A. They may be less than any value for this reason.

"Q. They may be less than any value? A. For this reason: It may be costing you money to keep that plant there; and you may be able to get the same service by connection through the city for less cost.

"Q. Let us put it this way: This plant which you say is capable of carrying the entire load, and which is used to carry the entire load from time to time, is in your opinion actually worth less than nothing to the owning company? A. I did not say it was; I said it might be.

"Q. I am not asking you to deal with possibilities; I am asking you to take the situation as it is there and give us your honest opinion as to whether this company *has an asset in that* equipment, generating equipment, in that building? A. I cannot tell you until I made a critical examination of how much it costs to operate that plant and how much you could buy your emergency power for from another source.

"Q. In brief, then, you do not know? A. No, sir, I do not know."

The value of the brick building less deprecation, I place at $1,000, and the value of the building to reproduce new now would be $12,300.00. I did not examine the foundation of the building. I observed the thickness of the walls of the building; they are 13 inches to 17 inches, 17½, the usual thickness; they are pretty heavily built walls. It is a one-story building. I do not know how long the walls and foundations will last and did not determine whether they would remain intact for a number of years to come. I have no opinion on that. It may last 50 years yet for what I can tell. The roof needed some repairing. I would not allow anything for it. It is practically gone. I did not estimate the cost of a new roof for a new building. The cost new of the building I estimate at 15c per cubic foot. I know what the cost of a roof new for the building would be, but have not got the data here to tell you. In estimating the cost of this building at 15c per cubic foot, it is ample. If you will give me a chance, I will give you the cost of a new roof on the building—whether it will cost more to put a roof on an old building or a new one depends upon what you would have to do. If you have to build

supporting members of the roof as well as renew the roof deck, it would be quite a job. You would have to renew a part of the supporting members of the roof on the present building. I cannot tell from a general inspection, but part of it has to be removed and renewed. If I were going to do the job, I would know what part, but do not know the percentage. If there were a new roof on that building, you would have a building there that would be capable of housing the equipment satisfactorily for quite a long time. I cannot tell you how much would have to be repaired, but probably a detailed inspection would show that you would have to remove the whole roof deck. I did not make such inspection. The building, with its present roof, is now housing the equipment, which is there and is keeping it, so far as the building is concerned, in condition so that it can be and is used. I am not in position to say that that roof could not be repaired for as little as $500. It is my opinion it could not be done for $500. I am in position to say that I would not take a contract to repair that roof for $500 and do a satisfactory job. I am handling a great deal of roofing all the time, but am not a roofing contractor. I am buying that kind of service. I have no means of knowing what it would cost to repair the present roof in the places where it needs repair.

I estimate the cost of a new roof on the power house building at about $2500, that is, a complete new deck and roof covering, a built-up roof, similar to what we use on buildings of this type, both for utilities and industrial plants, with roofing material similar to what you use on buildings of this type, a built-up roof, like those manufactured by The Carey Company and The Johns-Manville Company. There is now a slate roof covering on the building. I did not ascertain how the cost of producing electric current by means of the generating equipment now in the power plant at Norwalk compares with the cost in other stations, such as I might regard as having more modern equipment. I have no data of that kind furnished. The fact as to whether the power generating plant is in continuous use, or only in occasional use, does not strictly have any bearing upon the amount it depreciates. When you talk about the actual deterioration in its condition, you bring in the idea of maintenance. If you assume that it is maintained in condition, so that it can be and is used from time to time, but is not kept in continuous use, there might be a little higher maintenance—very, very small—if it is used all of the time, than if it is not used all of the time. A

power plant such as this would have to be out of commission occasionally for renewal, maintenance, because there is only one piece of equipment of each kind. As to the generator; if such a generator as that had been in constant use since 1895, there would be some difference in its present value than if it had been only in occasional use after 1915. It depends upon how that plant is kept. If the plant is kept free from dampness and moisture, so that the windings are kept dry, as it would be in the case of constant use, then there would be no difference. Generating equipment, which is maintained, so that it does efficiently produce power, may become worthless, before it is useless. I am using "worthless" in the sense of its ability to earn. In giving my opinion that the equipment in the power house should be given no value, I arrived at it this way: That from an accounting practice, it would have been depreciated to depreciation obsolescence years ago. It still may be useful and may earn, but whether it earns as much for the company as a different arrangement could earn is a question in my mind. In giving it no value, I am treating it from an accounting standpoint. As to whether it has an earning power or an actual value to the company, which it had, I would not want to make a statement regarding that unless I had more opportunity to explain what I mean. As to whether it has no earning power or that it was of no actual value to the company that owned it, I think I have answered that, as an accounting proposition, but not as an operating proposition. An expert accountant, who had never seen a power plant, could have testified from the same standpoint as I have testified, as to the lack of value of that power plant.

As to the high tension transmission line, I arrived at a value of $2,000 per mile and I say that that would be an ample cost of reproduction. I do not base it upon the present price of copper, but I base it upon a similar line which we built within the last few years, with the price of copper about 4c higher per pound than it is now. I did not say, in answer to a question as to the valuation, that it was at present prices, but at the price that we built the line for originally. I said, in my direct examination, that taking into consideration present prices it would be somewhat less than $2,000. The line I built was in Ashtabula County, Ohio. It was a line I would say, a little better built; the poles were larger, larger tops; very good, husky construction. I think there were about 22 miles, but not the same size wire. I made an

allowance for the wire, which was No. 4, and which I changed to equal No. 2 wire, on the basis of the old prices. The figure of $19,250.00, which I used for the reproduction cost new of the 200-kilowatt engine generator unit with exciter, switchboard, boiler and stack, was from my own records of that same capacity of plant. I can give a list of that, unit costs. That was construction; the purchases are only part of it. That is the actual construction cost, the complete plant ready to operate; purchases only give you part of the cost. I had to make up a plant of 200-kilowatt capacity with a 150-horsepower boiler. I did not have any single plant exactly like that, but I can give you the exact figures upon which that was based. I based it upon figures from my own office records, partly purchases, partly labor costs, etc. I do not have the data here to break down the cost of wire, cost of poles and the labor on the transmission line, but I took the total cost, $1819.00, and revised it for the different size of copper. I called it $2000 per mile. The cost of transmission line erected was $1819, and I considered $2000 was liberal. The wire cost there will run around $500 a mile. This line had a ground wire in also, which you have not at present. It is better built line. It costs at least $500 a mile for the wire. It may be $550. I don't recall right now. I did not ascertain what the condition of the wire, which is up there, now is. I undertook to depreciate it 50%, but have given full credit for the wire. I have not depreciated the wire at all. I have taken the transmission line and depreciated it, wire and all, 75%. That is aluminum wire. Aluminum wire does depreciate due to vibration set up in the wire during wind storms. It is more liable to break down than copper. It crystallizes more readily. I said I had not depreciated wire at all, but have depreciated the whole line, including the wire, 75%. Those two things are not inconsistent. The wire is the principal value in the line, and is included in my valuation of $50.000.00. According to the figures we have here, $12,500 of the value of $50,000 is wire, $12,500 for the wire alone. I took the general construction of the line and made an estimate of about how much that would depreciate over that period, the total; and using about 2% for your 35 years, when a line is not maintained as that line shows it has not been maintained. 25% is about all you can allow for the value of the cost new, or a depreciation of 75%. I did not divide it up into wire, insulators, pins, poles, etc., because I did not have time. I did not depreciate the wire, because I did

not break it up, but I have $12,500 for wire. I did not take into consideration any depreciation of wire separately in determining the present value less depreciation of the line. According to this figure of $500 a mile for wire, which I said was approximate, I said $500 was an estimate, I say that you would have to assume that I took no depreciation of wire into consideration with $12,500 at the present value. The present value of the wire as allowed by me in my grand total of the line is $12,500. That is the value of the wire, so that I allow no value for poles, substations, brackets or cross-arms, or anything else.

RE-DIRECT EXAMINATION

By Mr. Eversman:

In my figure of $33,800.00 on Exhibit Q, this consists of four figures; $19,250 for the cost new of the engine and generator units; $750 for wiring; $1,500 for land; and $12,300 for the building new, making a total of $33,800.

Thereupon the defendant offered in evidence Exhibits P and Q, P being an exhibit of the cost of reproduction less depreciation of certain properties of Ohio Electric Power Company, at Norwalk, made by Mr. Irvin, and Exhibit Q a somewhat similar estimate made by Mr. Spengler.

"The Court:

Is there any objection?

Mr. Welles:

We object to each of them, separately, on the grounds that they have no tendency to disprove the plaintiff's right to maintain this suit; and the testimony of these witnesses shows that they were made up on a wholly inaccurate basis to determine values.

The Court:

They will be admitted in connection with the testimony of these two witnesses for whatever relevancy they may have. I will not determine that now. Save your exception.

Mr. Welles:

Note our exception."

Thereupon the defendant called as a witness in its behalf

B. F. PRESTON,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

My place of business is 325 East Main Street, Norwalk, Ohio. I am engaged in the telephone business as city foreman for The Northern Ohio Telephone Company and have been connected with telephone work in the City of Norwalk continuously around 34 years. I was employed by that company July 1, 1924, and was acquainted then with the various lines, transmission lines, telegraph lines, telephone lines, and any kind of lines that conducted electricity within the City of Norwalk and had a general knowledge of that situation, including telephone and telegraph lines. On July 1, 1924, the different companies having wire lines extending through the City of Norwalk were the American Telephone & Telegraph Company, The Ohio Bell Telephone Company, The Northern Ohio Telephone Company (it was then The Norwalk Telephone Company), the Ohio Electric Power Company, the municipal light plant, The Western Union Telegraph Company, the New York Central telegraph lines, the Wheeling telegraph lines, The Lake Shore Electric Railway Company, and I don't know whether The Cleveland & Southwestern was then there or not. The Sandusky, Norwalk & Mansfield Electric Railway Company, I believe, had power lines. All these companies had wire lines, to my knowledge, suspended on poles, some underground, but most of them were on poles then.

"The Court:

When was the municipal plant built over there, do you remember, the electric lighting plant? What is the date of that, Mr. Craig?

Witness:

I don't know just when it was erected.

Mr. Craig:

It was erected, I think, early in 1916, but did not go into operation—

The Court:

Until 1917?

Mr. Craig:

Until about the first of 1917. That is my recollection. Mr. Martin, who was mayor, tells me it was started in 1916, that is, the operation.''

CROSS EXAMINATION

By Mr. Welles:

On July 1, 1924, there were electric light and power wires belonging to the City of Norwalk up in the streets of that city and there were electric light and power wires of the Ohio Electric Power Company or its predecessor, whichever was then operating, also in the streets of Norwalk at that time. The Lake Shore Electric had its power wires in there, its trolley wires and its feeder for the trolley, but it did not have electric light and power wires to my knowledge. As far as I can remember, it is correct to say that the only electric light and power wires which were then in use in the city belonged either to the city or to The Cleveland & Southwestern—the predecessor of the Ohio Electric Power Company.

REBUTTAL

Thereupon, in rebuttal, plaintiff called as a witness in its behalf

L. B. FAUVER,

who, having heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I am the L. B. Fauver who testified in this case before. I became counsel for the Ohio Electric Power Company upon the date of its organization, I don't know what year, but it was sometime prior to the time that

that company acquired the Norwalk property. I made an investigation in the consideration of the question of the rights which the Ohio Electric Power Company acquired in the streets of Norwalk, in connection with the bond issue which the Ohio Electric Power Company put out. I recognize Exhibit No. 76 as a photostatic copy of an original letter written by me at or about its date, February 4, 1925. The original of that letter was mailed in due course to Seibert & Riggs, of New York City. At that time, Seibert & Riggs represented Messrs. Victor and Albert Emanuel, of the Ohio Electric Power Company, and, in a way, The Seaboard National Bank. I believe The Seaboard National Bank was a trustee under the mortgage securing the bonds of the Ohio Electric Power Company. In addition to sending this letter, Plaintiff's Exhibit No. 76, to Seibert & Riggs, and before February 4, 1925, I conferred with officials of the Ohio Electric Power Company and gave them oral opinions with respect to the Norwalk situation. I discussed the matter with Mr. Victor Emanuel, who, I think, was president of the Ohio Electric Power Company. I discussed the matter frequently with Mr. Loeb and Mr. Shaw, who were, also, executives of the Ohio Electric Power Company and, of course, discussed the matter with Mr. Seibert. That was before the acquisition of the Norwalk properties by the Ohio Electric Power Company.

"Mr. Eversman:

If Your Honor please, it seems to us that testimony of this particular kind is entirely immaterial and irrelevant. Here is a man who says he was attorney for the Ohio Electric Power Company, and is stating that he had certain discussions with certain officials of the company, apparently as to their rights. Any opinions he may have entertained as to the rights of the company are immaterial to the issues in the case.

Mr. Welles:

We expect to show, if Your Honor please, that the president of the Ohio Electric Power Company in turn gave an opinion in the form of a letter in writing to the bankers who underwrote the bond issue.

Mr. Eversman:

Even if that is so it is entirely immaterial.

The Court:

What you are trying to show is actual reliance upon the state of the law as it was at the time?

Mr. Welles:

Yes, Your Honor.

The Court:

Perhaps that may be presumed; but I do not see any harm in showing it to be a fact.

Mr. Eversman:

As I understand this testimony relates to an opinion Mr. Fauver may formerly have given.

The Court:

I suppose what they are attempting to show is that he advised them on the basis of the law as it existed at that time, and that there was actual reliance by the predecessor of the plaintiff or perhaps by the plaintiff that that was the law, is that not so, Mr. Welles?

Mr. Welles:

Yes, Your Honor. Four lines of this letter read as follows:

'While we enjoy no franchise from the City of Norwalk, still under the law of Ohio, we have a full right to continue our operations in the same manner and to the same extent as our predecessors have operated.'

Mr. Eversman:

It is entirely immaterial what this man's opinion may have been of the rights of the company.

The Court:

Of course, he can not bind the court by his opinion of the law, but I think they have a right to show that they bought the property on the assumption that that was correct. Now if that is not a correct statement of the law, it does not make any difference in the case.

Mr. Eversman:

That is just the point, Your Honor. It seems to me it is entirely immaterial.

The Court:

He wants to show reliance. I think that is relevant. Save your exception.

Mr. Eversman:

Exception.

Q. What, in substance, did you say to Mr. Emanuel and to Mr. Loeb, and to the other officers of the Ohio Electric Power Company at these interviews you mentioned on the subject of the rights which the Ohio Electric Power Company would have in the streets of Norwalk if it acquired the Cleveland & Southwestern properties?

Mr. Eversman:

We object, on the same ground.

The Court:

Overruled. Save your exception.

Mr. Eversman:

Exception.

A. I stated to them that there was no franchise from the City of Norwalk vesting any rights in this property. At that time it was owned by either the Ohio Electric Power Company or Victor Emanuel."

The date of that letter is February 4, 1925. I stated it was my judgment, based upon an examination of the law of the State of Ohio, that a company whose charter was issued to it prior, I think, to 1895, to operate a public utility, had the right to continue operating that utility in the community where it had built its plant and started its operations. I said to them that my opinion was somewhat based upon a very extended discussion of the matter indulged in by Mr. Craig, a copy of which I think I had furnished to me by The Cleveland, Southwestern & Columbus Railway Company. The Mr. Craig, to whom I refer, is the gentleman who sits at the trial table. I remember distinctly talking with Mr. Victor Emanuel over the long distance telephone—I can not give the date—but sometime prior to the time of the issuance of the bonds—and gave him the same opinion that I have just indicated. I remember, also, talking both personally—I think in New York and by telephone with Mr. Seibert at the time the bonds were about to be issued, about the right of this company to operate in the City of Norwalk; and stating positively that it was my judgment, under the laws of Ohio, the company's rights to operate in Norwalk had been fixed by the law of Ohio; and when it got its charter from the State of Ohio, under the law that then existed, it became vested with that right to continue operations in that city. I discussed with them whether this right was one at will or in perpetuity; and told them that, under the law of Ohio, as revealed by various Supreme Court decisions, this right was a perpetual right they had acquired when the charter was issued by the State of Ohio; and that no franchise rights were necessary from the City of Norwalk. And the Supreme Court decision has not changed my mind about it either.

"The Court:

Is there any Supreme Court decision you can point to that says this is a perpetual franchise?

A. Oh yes, plenty of them. I will be glad to argue it, Your Honor; especially the Wyandotte case. I think the law is absolute vesting in a company that got a franchise prior to 1895 the right to continue operating.

The Court:

You will have to omit one year on that, on any theory; that is, between 1886 and 1887.

Witness:

Yes. There was a certain lapse of time." As I recall the matter, Mr. Craig represented The Cleveland & Southwestern Railway Company, the owner of this property prior to the time it was transferred to Mr. Emanuel. I secured Mr. Craig's opinion, Plaintiff's Exhibit No. 77, I think, from The Cleveland & Southwestern on or about the time they transferred the property to Mr. Emanuel. Before that opinion was delivered to me, I believe the Southwestern secured Mr. Craig's consent to its being turned over to me. If I am wrong, he will correct me. This letter, Exhibit No. 77, dated September 29, 1927, is addressed to Mr. Frank H. Ginn, Williamson Building, Cleveland, Ohio. At that time, Tolles, Hogsett, Ginn & Morley were general counsel for The Cleveland & Southwestern Railway Company.

No cross examination.

Thereupon, plaintiff offered in evidence Plaintiff's Exhibits Nos. 76 and 77.

"Mr. Eversman:

We object to the introduction of Exhibits 76 and 77 on the ground that they are irrelevant and immaterial.

The Court:

Do you think Mr. Craig's opinion relevant here for any purpose?

Mr. Welles:

Yes, Your Honor, on this theory; in some of the cases, as we read them, we find comment made by the courts to the effect that the operating company has at all times maintained the position that in a particular case it had certain rights; and particularly in view of the fact that some claim is made here that this company applied for a franchise at one time, we think it is important to show that it at all times thought it had a franchise from the state already.

The Court:

I will admit 76 at this time. I am in doubt about 77. I will hold that at this time. I am glad to have Mr. Craig's opinion."

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

LELAND E. YEAGER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

My residence is 32 Edgewood Drive, Scarsdale, New York. I am and have been, since August 1, 1923, associated with A. C. Allyn & Company, Inc., investment bankers, whose business is the purchasing and distributing of investment securities. I personally had to do with a transaction or transactions, by which A. C. Allyn & Company purchased certain bonds issued by the Ohio Electric Power Company, when the company was formed, I believe, in 1924, and subsequently.

"Q. Did you have to do with the transaction by which an aggregate amount of $949,000 of first mortgage 6½% bonds were acquired by A. C. Allyn & Company, Inc., from the Ohio Electric Power Company, and offered by A. C. Allyn & Company to the public?

Mr. Eversman:

Objection.

The Court:

What is the amount?

Mr. Welles:

$949,000.

Mr. Eversman:

As being irrelevant and immaterial.

The Court:

Why, Mr. Eversman?

Mr. Eversman:

What difference does it make whether he offered these bonds or did not offer these bonds?

The Court:

He is probably going to show that these bonds were in the hands of innocent holders, is that not so, Mr. Welles?

Mr. Welles:

We expect to show that; also to show that A. C. Allyn & Company bought the bonds in the first place in reliance upon a letter from Mr. Albert Emanuel, which contains the statement:

'The franchises under which the company operates are satisfactory in form and without burdensome restrictions.'

That refers to Norwalk as well as the other companies.

Mr. Eversman:

That would not be binding upon the city, if Your Honor please.

The Court:

I doubt whether that would be relevant. Make up your record on it. I think you have a right to show that these bonds were in the hands of innocent holders.

Mr. Welles:

Are we not entitled to show that the vice-president of the Ohio Electric Power Company, having the advice of counsel we have shown, in turn conveyed to the bankers the information that they had franchises; and that the bankers then sold these bonds on a circular stating they had franchises? This is a bond-offering circular.

The Court:

I know. The difficulty with it is it is so indefinite. How could the city be bound by anything of that sort in any case?

Mr. Welles:

Of course the question whether it is indefinite may go to its weight. If I do not show it applied to Norwalk, Your Honor will be justified in disregarding it, of course. But I expect to show that by this witness.

The Court:

This is a circular put out by A. C. Allyn & Company?

Mr. Welles:

Yes, Your Honor.

The Court:

What more do you propose to show, that this went to various bondholders who purchased the bonds?

Mr. Welles:

Yes.

The Court:

I think it is relevant.

Mr. Eversman:

Note an exception.

The Court:

Save the defendant an exception to all this testimony.

Question read.

A. Yes, sir."

Plaintiff's Exhibit No. 78 is a circular of A. C. Allyn & Company offering Ohio Electric Power Company First Mortgage Gold Bonds, Series A, 6½% Sinking Fund.

This circular deals with the $949,000 of Ohio Electric Power Company bonds I have just mentioned. Prior to the issuance of that circular, I believe the Ohio Electric Power Company had acquired the Norwalk property. There are certain references to the Norwalk properties in this circular at points marked in the margin in pencil. Those references are to the electric light and power plant and distribution system at Norwalk, formerly operated by The Cleveland & Southwestern, and then by Albert Emanuel. The letter dated New York City, New York, August 24, 1925, purporting to have been signed by Victor Emanuel, vice-president, printed in full on the inside of this circular, was received by A. C. Allyn & Company before that circular was put out.

"Q. What, if any, knowledge or information did A. C. Allyn & Company have with respect to the franchise situation at Norwalk before it put out this circular, Exhibit No. 78? A. We understood and relied in the purchase of these bonds by virtue of a statement that the franchises under which the company operated were satisfactory and not burdened with unusual restrictions of any kind.

Mr. Eversman:

We move to strike that answer out as not being responsive.

Mr. Welles:

I think it is responsive.

The Court:

As far as it refers to a reliance, it is not responsive and that may go out.

Q. In your answer were you referring to the statement in Mr. Emanuel's letter, which appears in Exhibit No. 78, reading: 'The franchises under which the company operates are satisfactory in form and without burdensome restrictions'? A. I was.

Q. You may state whether or not you understood that statement given in Mr. Emanuel's letter to apply to Norwalk as well as other cities mentioned in the circular? A. We so understood.

Q. I wish you would state, Mr. Yeager, what, if any, importance there was in connection with the purchase of this bond issue by your firm, in the fact that the City of Norwalk—the electric light and power properties in the City of Norwalk, and, as you understood, a franchise to operate them in the City of Norwalk, were included among the properties under the mortgage?

Mr. Eversman:

Objection to that, if Your Honor please. You can see the impropriety of the question.

The Court:

All he is really trying to find out is whether he attached any importance to the Norwalk properties.

Mr. Eversman:

Even so, the answer will be so indefinite and uncertain it cannot help the court.

The Court:

Your objection goes to the weight of his testimony rather than its relevancy. Overruled. Save your exception.

Mr. Eversman:

We further object to its relevancy. Exception.

Witness:

Certainly we understood that added to the values of the properties, and thereby fixed the amount of the bond issues we would care to purchase and offer for resale."

My understanding was that approximately $130,000 of the bonds—thereabouts—included in the $949,000 was based on the acquisition of the Norwalk properties.

"Q. You may state whether, without the Norwalk properties including a franchise, such an amount of bonds would have been salable based on the rest of the property only, in your opinion?

Mr. Eversman:

Objection.

The Court:

Overruled. Save your exception.

Mr. Eversman:

Exception.

A. In my opinion, certainly not."

I have had a number of such transactions, dealing with bonds of public utility corporations.

"Q. What, if any, importance is there in connection with the purchase and resale of bonds of public utility corporations in the question as to whether the public utilities have or have not franchises?

Mr. Eversman:

Objection to that, if Your Honor please.

The Court:

What is the purpose of that?

Mr. Welles:

I want to show that in his opinion as an expert in that line of business, bonds of public utilities are not salable unless they are backed by franchises.

The Court:

It seems to me the answer to that is obvious.

Mr. Welles:

I think so.

The Court:

All right. Let him answer it.

Witness:

It is of the greatest importance.

Mr. Eversman:

We ask that the answer be stricken.

The Court:

Overruled.

Mr. Eversman:

Exception."

My opinion is that the full amount, $949,000 of bonds offered by circular, Exhibit No. 78, could not have been offered in that amount on the basis of the properties then owned by the Ohio Electric Power Company, if it had been a fact that the company had no franchise rights to operate its Norwalk properties, and that they could not have been successfully sold.

All this evidence went in over objection of defendant.

Plaintiff's Exhibit No. 79 is a circular of A. C. Allyn & Company, Inc., offering certain bonds of the Ohio Electric Power Company and dealing specifically with the First Mortgage Gold Bonds, Series B, 6% Sinking Fund, in the amount of $647,000. This circular deals specifically with the Series B bond issue, but with the whole picture, the First Mortgage Series A and the First Mortgage Series B bonds are all under the same mortgage; and, therefore, the entire story affects the entire issues under that same mortgage. Exhibit No. 79 was put out in connection with the offering of Series B 6% bonds. The original of the letter on the inside of Exhibit 79 addressed to Messrs. A. C. Allyn & Company, dated New York, August 26, 1926, purporting to be signed by Victor Emanuel, vice-president, was received by A. C. Allyn & Company before those bonds were offered and this circular put out.

What I have said, with respect to the importance of the Norwalk franchise, in respect to the $949,000 series of bonds, also applies to this circular, and to the offering of this $647,000 series of "B" bonds.

"Q. Did you or did you not understand the statement of Mr. Emanuel in the letter which is included in Exhibit 79, reading: 'The franchises under which the company operates are satisfactory in form and without

burdensome restrictions,' to refer to the situation at Norwalk as well as at the other cities mentioned in the letter?

Mr. Eversman:

Objection.

The Court:

Overruled.

Mr. Eversman:

Exception.

A. It was so understood."

The result of the offering of these bonds was that they were all sold, and these circulars were submitted to prospective purchasers of the bonds, and the sale was made by A. C. Allyn & Company to these purchasers for value.

"Q. What, if you recall, did these bonds sell at?

Mr. Eversman:

What time, Mr. Welles?

Mr. Welles:

When A. C. Allyn & Company sold them.

Mr. Eversman:

In 1925.

Mr. Welles:

The original offering. I am speaking now of the two series?

Mr. Eversman:

Objection to that. It is entirely irrelevant and immaterial when he sold them.

The Court:

He may answer that. Save your exception.

Mr. Eversman:

Exception.

Witness:

At a very slight discount from par; the exact figure I cannot recall.

Q. Have you any opinion, Mr. Yeager, as to what effect, if any, there would be upon the market value of the outstanding bonds of the Ohio Electric Power Company, secured by mortgage on its Norwalk properties and its other properties, if it should be finally determined that the City of Norwalk has the power and has exercised the power to terminate all of the Ohio Electric Power Company's rights to use and occupy the streets and public places of the City of Norwalk?

Mr. Eversman:

Objection to that, if Your Honor please. It is irrelevant and immaterial.

The Court:

Overruled. Save your exception.

Mr. Eversman:

Exception.

Witness:

It would have a very adverse effect; not only because it would destroy some of the security for the bondholders, but it would lead the bondholders to question what might happen in other situations if the same procedure were followed. It would have a very serious effect.

Mr. Eversman:

Objection to that.

The Court:

The collateral effect of this litigation is not important. Would it have any effect upon the market value of these particular bonds? A. It would.

The Court:

That is all we are interested in.

Q. What effect? A. An adverse effect.

Q. Decrease their market value?

Mr. Eversman:

Objection.

The Court:

That is relevant. Save your exception.

Mr. Eversman:

Exception.

A. Decrease their value.

Mr. Welles:

You may cross examine.

Mr. Eversman:

That is all.

Mr. Welles:

That is all, thank you, Mr. Yeager."

Thereupon, plaintiff offered in evidence Plaintiff's Exhibits Nos. 78 and 79, in connection with the testimony of Mr. Yeager.

"Mr. Eversman:

Objection, upon the ground that they are irrelevant and immaterial to the issues in this case.

The Court:

They are admitted, with exceptions saved to the defendant.

Mr. Welles:

They will be received, Your Honor?

The Court:

Yes."

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

ROBERT L. CHRISTIAN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I now reside at Cleveland, but formerly resided at Norwalk, which place I left in 1917. I went to Norwalk from Cleveland in 1901 and I resided there continuously until 1917 or thereabouts. When living in Norwalk, I was a reporter in the newspaper business and, also, clerk of council from 1912 until the fall of 1917, when I left Norwalk. I recall attending a mass meeting held in the Assembly Hall of the fire department in the fall of 1914. It was not in the same building where the council met. It was a mass meeting of Norwalk citizens, and members of the council were present at the meeting. Mr. Myers, of Ashland, and Mr. Wolf, also, were both present at that meeting, representing The Cleveland & Southwestern Railway Company, then operating the electric light system in the city. Mr. Myers and Mr. Wolf addressed those present. Other people, citizens of the town, were present and, also, made talks.

"Mr. Boxell:

I presume there will be no objection to the use of a copy of this newspaper account?

Mr. Eversman:

In place of the newspaper itself?

Mr. Boxell:

Yes.

Mr. Eversman:

No."

This bound volume looks like a file of The Reflector-Herald, which was a daily newspaper published in Norwalk, Ohio. It was a Republican paper.

Attention of witness was called to what appears to be an issue of Saturday, November 21, 1914, and an article therein entitled "Municipal Light Ownership Is Still in the Lead."

This is an account of the meeting held November 20th, in Norwalk, an account of the mass meeting I have referred to, and the article was written by myself. It is a faithful, accurate reproduction of the events of the meeting which I have referred to. I have looked over

that particular article and refreshed my memory as to what was said at this particular meeting.

Mr. Myers was in a rather apologetic frame of mind that night. He admitted that they had been remiss in their duty to Norwalk, perhaps, on the electric light plant, and wanted to show they were in good faith and would make good, and asked that they be given an opportunity to revamp their plant to a certain extent and show their good faith in the matter toward Norwalk. The subject of a municipal lighting plant was under discussion at the meeting. The city had voted bonds for the municipal light plant and this meeting was held after the election, but I could not tell just how long. I don't recall that Mr. Myers talked about the municipal light plant directly. My recollection is that his company wanted a chance to make good there. The company was willing to spend some money, and if the city was not satisfied at the expiration of the trial period, which was the balance of the company's franchise, or the time it had to run, or whatever you want to call it, the company would back out or sell out. At that time, there was a street lighting contract, which expired the following year. I do not recall that the discussion at this meeting related to a new street lighting contract in any way. Mr. Myers said, as I stated before, that he was there in an apologetic frame of mind. I would not undertake to say what he said, sixteen or seventeen years after the meeting was held; but I bank on that article. I quoted Mr. Myers in that article; whatever the quotations are there, are correct. I could give you substantially what was said by an inspection of the article in the paper. Whatever he was quoted as saying there, I will say that he said. Whatever is quoted there were the words of Mr. Myers, as near as they could be reported by a man who was not taking shorthand. To read that article refreshes my recollection. Mr. Myers said, just as I already told you, "We know we were guilty of acts of omission and we are now prepared to give you better service." He asked them to give his company a trial; give his company a chance to make good, to revamp its plant and give better service than it had been giving. Neither Mr. Myers nor Mr. Wolf, at this particular meeting which is reported in the issue of November 21, 1914, requested or referred to a franchise from the city. I will say this: I was there and reported that meeting for the newspaper; and if they had said anything about that, it would have been right up on top; that would have been the principal item of news at that meeting; it would not

have got by me. I do not recall that anything was said about a franchise. My recollection is that nobody, either the citizens or any representative of the company, at that particular meeting, referred to a franchise.

I was clerk of the city council from January, 1912, to about October, 1917, nearly six years. I do not recall any legislation by the City of Norwalk durjng that period looking to any change or having any reference to the way in which The Cleveland, Southwestern & Columbus Railway Company should use the streets of the City of Norwalk for its electric distribution lines.

"Mr. Boxell:

We will offer Plaintiff's Exhibit No. 80, which is a copy.

The Court:

I don't think that is relevant. His testimony on the subject is relevant and he has covered it on the point you are really interested in.

Mr. Boxell:

I shall not insist upon it. You may cross examine."

CROSS EXAMINATION

By Mr. Martin:

Numerous council meetings were held about that time, with reference to the light proposition. I do not recall Mr. Myers ever being present but this one time. Possibly, I might not have been there, if it was an afternoon meeting, but I think I would have been. At that discussion that night, quite a lot of feeling developed, and quite a number took part in the discussion. They complained of the service. I remember Mr. Harkness complained that he could not get any service for his elevator. I remember that, at nearly every meeting, cards showing an outage in the street lights were presented by various citizens, and the electric light company was notified of the outage and its bills were reduced by that outage. I remember of citizens coming and complaining to council of the service on some of the streets, and the company's attention was called to the matter, sometimes by individuals and sometimes by councilmen. Mr. Wolf may have been down there several times, I would not say exactly. I rely mostly on the newspaper article for refreshing my memory. At that time, the bonds had been voted by the city. There was some talk of the officials of the Green Line trying to prevent the sale of the bonds by a taxpayer's suit. I don't remember whether such a suit was started or not.

They said they wanted the city to give them an opportunity to make good for the balance of their street lighting contract. I can not give you any more concrete language than I have. I am relying upon this article; and have been out of Norwalk for nearly 15 years. My recollection comes very largely from this paper.

The bond issue, I think, was for $100,000 or $125,000.

RE-DIRECT EXAMINATION

By Mr. Boxell:

In the requests of Mr. Myers and Mr. Wolf, at this meeting, I think that they asked that they be given an opportunity to make good during the balance of their street lighting contract.

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

A. A. RUFFING,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Norwalk and have lived there practically all my life, outside of five years. I was on the council two years in 1924 and 1925. I recall attending a mass meeting in the City of Norwalk, in the fall of 1914, in relation to the lighting situation there. It was held in November, 1914, in the city building, in the council chamber and fire department, and in the evening. Quite a number of citizens were there and, representing The Cleveland, Southwestern & Columbus Railway, were two men, F. E. Myers and Mr. Wolf. These men talked to

the meeting. I recall some of their talk. The talk of Mr. Myers was regarding a contract for a year or two trial of lighting the city. It had reference to the street lighting. He said he wanted to show the people of Norwalk that the company could do better than it had done in the past. Mr. Wolf stated that they wanted another trial; he said about the same thing. No request was made there for a franchise, or any franchise discussed. Other people spoke at the meeting, citizens of the Town of Norwalk—Mr. McKnight, Mr. Martin, Mr. Craig and Mr. C. H. Gallup. Nothing was said about a franchise. The Craig and Martin, referred to, are G. Ray Craig and Edgar Martin, now present in the court room.

While I was a member of the council in 1924 and 1925, no legislation having to do with the manner in which electric lighting companies or telephone companies should use the streets with poles and wires, other than an ordinance of July 1, 1924, was passed.

CROSS EXAMINATION

By Mr. Martin:

This meeting was held in a hall over the fire department, but it was not the council chamber. I thought it was the council chamber at that time. Afterwards it became the council chamber. I remember Mr. Titus and Mr. Harkness speaking about the condition of the lines and wires, and the fact that they could not get any power in their houses; but I don't remember that any of the Green Line officials stated that they would have to rebuild all their lines, if they continued there, nor do I remember their saying anything about the condition of the wires, nor any complaints about the burning of trees. I will not say that was not said. It was rather an exciting meeting, and a lot of criticism was made of that system. They asked for a contract with the city for a year or two. I am not sure that they used the word "contract," they might have used the word "agreement." I did not hear anything discussed about commercial lines. I don't remember that Mr. Harkness complained that he could not get power to move his elevator. I remember Mr. Harkness was there, but don't remember what he said.

RE-DIRECT EXAMINATION

By Mr. Boxell:

This place where the meeting was held did become the council chamber. It must have been shortly afterward. The contract or agreement, which has been referred to, related to the lighting of the city, of the streets and public places.

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

L. J. WOLF,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at Cleveland and my business is investments. I was Vice-President of The Cleveland & Southwestern for a number of years, but I do not remember the period. It included the year 1914. I recall going to Norwalk with F. E. Myers and taking part in a public session on the subject of electric light and power service. Mr. Myers was president of the corporation. I was there on that errand, I think, only once; that, as I recall, was in the year 1914. I do not remember the character of the structure where the meeting was held, but my recollection is that there were two meetings, an afternoon and an evening meeting, I am not certain about that. I think in the afternoon, we met with the councilmen in an informal meeting, and the evening meeting was more of a mass meeting. I was with Mr. Myers at both meetings and heard what was said, if there were two meetings. If there were two meetings, I took part in what was said

at both of them. Mr. Myers discussed the character of the service we had been giving, and was apologetic and desired an opportunity to prove that we could improve the service. That is, I think, summing up what he said. I had more direct charge of the operation than Mr. Myers did, and, therefore, I went into details further than he did. I explained that the transmission lines from Elyria to Norwalk, which were used to a considerable extent for the service there, I explained that they were installed at an early stage of the art of high tension transmission; and that meanwhile the art had been improved. Thus it was learned that the wires should be spaced farther apart as the pressure or voltage was higher than had obtained in the early day of the construction of these lines; and it is, also, true that by that time the poles, transmission poles, were somewhat affected by age and, therefore, would not withstand the high winds as they did, when they were new; and they were being replaced—it was just developing then—either by concrete or steel poles. So that we felt—and I explained—that if we were given an opportunity to demonstrate to the City of Norwalk that we could improve their street lighting, we would like them to give us that opportunity, and we would invest the money necessary to do this. I said to them, as I remember:

"If you go ahead, as I understand you contemplate, installing a municipal plant for the purpose of street lighting, you inevitably compete with us on commercial lighting; that is the trend of those things; and that will naturally affect our opportunity to make money and your opportunity to make it pay. The city is not big enough to justify competing systems, and there is not enough business here to justify your coming in to compete with us."

So I was trying to persuade, as best I could, the citizens and council to defer, at least, any investment on the part of the city until such time as we could demonstrate that we could give them this service or street lighting by investing this additional money necessary to rehabilitate the service and to rehabilitate the lines.

The entire purpose of this conference was to renew the street lighting contract, if we were able to make good. We never considered and never felt that there was any question about our right to stay there for commercial and industrial purposes. The only question was whether the street lighting contract should be renewed, and we did not ask for a long time renewal because we felt that because of our service not having been as satisfactory as

it could have been, it was up to us first to demonstrate that we could give this improved service for street lighting.

Neither Mr. Myers nor I, or anybody else, requested that the city or its citizens should consider giving us a commercial franchise. There was no discussion of our securing a right from the city of a franchise from it for commercial and residential lighting.

(Witness shown Plaintiff's Exhibit No. 81, a copy of letter sent by F. E. Myers to the city council, City of Norwalk, in October, 1914.)

Plaintiff's Exhibit No. 81, as I remember, is a letter sent by Mr. Myers to the mayor and city council of the City of Norwalk shortly prior to the meeting, which he and I attended. The outcome of that letter was the attendance by Mr. Myers and myself of the meeting in Norwalk.

Plaintiff's Exhibit No. 81 offered in evidence, there being no objection on the ground that it is a copy.

CROSS EXAMINATION

By Mr. Martin:

I do not remember any statement by Mr. Myers that if they could not get a contract or permit or franchise that they would be glad to sell the city power. In this letter, Exhibit No. 81, we offered to sell power to the city. Mr. Myers said if the city built its own plant, he would be glad to furnish power, but that was not in the form of a franchise; he was not asking for a franchise. This meeting was after the election on the bond issue, and I think in 1914.

I don't remember that an action had been brought to question the validity of the bonds issued. I don't remember whether that was discussed at that meeting. It may have been. There was some discussion at some time of a bond issue and the validity of it. I was not there more than once to attend meetings, but used to go to Norwalk quite frequently and met the city officials at other times and discussed the matter in an informal way. I don't think Mr. Myers was there more than that time. He may have been at another time. It may be we went there in a special car. We made inspections of the road occasionally. I remember Mr. Myers stating that inasmuch as the city was insisting upon building its own distribution, the Green Line would be glad to furnish power, but my recollection is that that was for street

lighting. The letter was sent out prior to the mass meeting. I do not recall Mr. Myers saying that if they could not get an agreement with the city they would have to take the poles off the streets.

I was present at a formal meeting, that is my recollection; I think I have met several times, as I said before, at informal meetings with the council, or some of the city officials, but not relative to a continuance in the city, but relative to a continuance of the right to light the streets. There was never any question in my mind about our right to continue in the city and that was by advice of counsel too. We never discussed anything, as I remember it, but the lighting of the streets.

RE-DIRECT EXAMINATION

By Mr. Welles:

At these several other informal discussions, which I have mentioned, I don't remember whether I was the only representative of the company. Mr. Myers may have been present, and I believe our local manager of the lighting plant; in fact, we had two managers at two different times. I think each of them was present at such conferences as we had. Mr. Myers, once or twice, as I recall, went with us on an inspection tour of the whole line. Mr. Myers died about a year and a half ago.

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

A. A. RUFFING,

who, having been heretofore duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

Plaintiff's Exhibit No. 82 is a circular, signed by Mr. Turkle, local manager of the Ohio Electric Power Company, copies of which were generally circulated by the Ohio Electric Power Company among its customers in Norwalk.

Plaintiff's Exhibit No. 82 offered in evidence and admitted without objection.

Plaintiff's Exhibit 83 with the engineer's certificates attached thereto was admitted, not as evidence of value, but only as evidence of what the trustee had before it at the time of authenticating and delivering the bonds referred to in said exhibit on the question of the compliance of the Ohio Electric Power Company and the trustee with the provisions of the mortgage indenture and the mortgage supplemental thereto, under which the bonds were issued.

Plaintiff's Exhibit 84, being a record of the council meeting of the city council of Norwalk March 25, 1915, was offered and admitted over the objection of the defendant that it was irrelevant and immaterial, defendant reserving an exception to its admission.

"Mr. Welles:

We have pending an objection to Defendant's Exhibit C. We desire to stand on our objection to all of it except that part of it beginning with the words: 'Property Section,' and from then on to the end of it we withdraw our objection."

SURREBUTTAL

Thereupon, the defendant, in surrebuttal, called as a witness

EDGAR G. MARTIN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I was mayor of the City of Norwalk in 1914 and served in that capacity two consecutive terms. I remember various discussions relative to the electric light situation in the City of Norwalk throughout the years 1914 and 1915. When I was mayor in Norwalk in 1914, I recall that F. E. Myers came to Norwalk, in connection with the business of The Cleveland, Southwestern & Columbus Railway Company, bearing upon the lighting situation. He came there on more than one occasion. I was present in my capacity of mayor of the City of Norwalk, when any discussion took place between Mr. Myers and myself, or among Mr. Myers, myself and other officers of the city.

A discussion took place at the council chamber proper in the Whittlesey Building, some time in the year 1914, and I think Mr. Nester was present, and, at one time, Mr. Wolf; and at another time, I don't know whether Mr. Wolf was present, but Mr. Frank Ginn was present. C. B. Lawrence was not a councilman at that time, but George Fifner was a member of the council. I have no personal recollection whether Mr. Fifner was present or not; but recall a conversation with Mr. Myers, concerning a franchise, in which I participated in connection with the company's business in the City of Norwalk. The conversation came up after the vote on the bond issue. I told him we had gone on so far with it; we had the vote of the people, ten to one, and we were going ahead with the municipal plant. He said, "Then, in that case, we will have to get out of Norwalk." He said, "Why can't we sell you power? You have your own distributing lines and furnish lights and customers, and we will rebuild our power plant and furnish you the power." That was in 1914, in the fall. I think he said he would submit a proposition as to the price for which they would furnish power, and we do our own distributing.

My recollection is that Mr. Myers stated his company wanted a new franchise; that it would have to spend a lot of money. It would not go ahead until it had a franchise justifying the expenditures. I can not tell whether that was in the council room or whether it was in my office as mayor or not; but the statement was made.

At the meeting at the fire department hall, the question of street lighting, commercial lighting and franchise was discussed. It was discussed at all these meetings. Some time in those discussions—I can not recall which one—the statement was made that the company would sell us power.

During the four years I served as mayor, there were continued complaints regarding the service, relating to all kinds of service, to the commercial, as well as the public lighting, and complaints that the transmission line was down, and that it was not furnishing power and light. We were without lights and power, as I recall it, in the winter time in storms—there was trouble with the transmission lines—I don't know how long the interruptions were. When the power was off, there was no way of supplying it, and the business places and streets were then in darkness.

CROSS EXAMINATION

By Mr. Welles:

I do not recall receiving Plaintiff's Exhibit No. 81, the original of it. It seems familiar to me, such a letter, but I have no personal recollection of it. I probably did receive it—I don't think there was any correspondence with Mr. Wolf whatever, as I recall it. I have not made any search, nor had any made, of the files of the mayor and the city council, to see whether there are any other letters from Mr. Myers or Mr. Wolf, or anybody else, representing the company, in which they mention the word "franchise." I don't think I received, during my term of service, any letter from any representative of the company, in which they suggested the granting of a franchise.

Thereupon, the defendant offered in evidence Defendant's Exhibit T, being a report of the receiver of The Cleveland, Southwestern & Columbus Railway Company to the Honorable Judge Westenhaver, in the case of General Electric Company vs. The Cleveland, Southwestern & Columbus Railway Company in the United States District Court for the Northern District of Ohio,

Eastern Division. The exhibit was admitted over objections of the plaintiff.

"Mr. Welles:

He is not entitled to this preliminary report of the receiver, to begin with. He is just taking his first crack at it. Suppose he left out a car on the railroad; does that mean they did not own it, if he reported 99 cars and they owned 100?

"Mr. Eversman:

I think it is as good as the evidence of Mr. Wolf.

"The Court:

I do not see how that is binding on the plaintiff.

"Mr. Craig:

It may not be; but it seems to me it is one of the circumstances to be considered by this court in view of the different items of circumstantial evidence.

"The Court:

I will hold it and you can search that case to see if there is any other report of the receiver.

"Mr. Welles:

Yes. Maybe we will find a second report in which he put in a record.

"Mr. Craig:

In Exhibit 27 offered in this case reference is made in the deed of the special master of the Cleveland and Southwestern Railway to a list of the property that was sold by the receiver or by the special master. I am offering it for the purpose of showing, as I said some time ago, that it is a circumstance here, among all other circumstances, indicative of whether or not there was any franchise.

"Mr. Welles:

I don't believe the receiver's opinion is as good as Mr. Craig's."

By stipulation of the attorneys for the respective parties herein, it was agreed that the depositions of C. E. Tucker and John R. Berry taken July 15, 1927, in the case of State of Ohio on relation of Edgar G. Martin, Prosecuting Attorney of Huron County, State of Ohio, vs. Ohio Electric Power Company, in the Court of Appeals of Huron County, Ohio, could be offered in evidence by defendant.

Thereupon, the defendant, offered in evidence the

DEPOSITION OF C. E. TUCKER,

who testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I reside at Norwalk, Ohio, and will be 50 years of age in September. I was formerly clerk of the Court of Common Pleas and of the Court of Appeals of Huron County, and, prior to that time, served as deputy clerk. I commenced my duties as deputy clerk in 1899 and served three years and then went to the Probate Court as deputy clerk thereof, where I served seven years, during the incumbency of Judge Charles Suhr, except the latter part of his term, when I was elected clerk. I commenced my duties as clerk of the Common Pleas Court in August, 1909, and served four years, my term expiring in 1913. During the time I was clerk of the Court of Common Pleas and of the Court of Appeals of Huron County, I had charge of the records and all papers and documents of every kind that were in the court. Since I left the clerk's office, I have been an abstractor of land titles and am now president of The Holiday & Tucker Company, an abstract company of this city. Since leaving the clerk's office, I have been continuously in touch with it. I was clerk of the Court of Common Pleas at the time the court house burned in 1912. I had no personal knowledge of any of the papers, files or exhibits pertaining to the case of Cutter vs. Incandescent Light & Power Company, No. 3994 on the appearance docket of the court, neither do I remember having seen the papers, files and exhibits in that case, while I was acting as clerk. The files, exhibits, bills of exceptions and any documents that were offered in evidence, or any records that were offered in evidence, that were not called for by the parties or attorneys, after the case had ended, were all kept in one end of the garret of what was the third story of the old court house. In fact, all the files in the cases, prior to about the year 1892, were there. They were arranged or put in pasteboard boxes and the exhibits and bills of exceptions and so on were on the shelves and some of them tied in bundles. I was in the city when the court house burned in 1912. The fire occurred about eleven o'clock at night. I was present at the fire, soon after it started, and it started in

the room on the southwest corner, where these files were located. None of the files or the contents of the garret or room were saved from the fire. They attempted to save them, but they were so badly burned they were all taken down and hauled out and dumped with a lot of rubbish. Nothing was saved above the second floor in the way of records and papers. The fire occurred July 9, 1912.

At Mr. Craig's request, I made a search for the files, documents, exhibits and any other pleadings or papers in Case No. 3994—Cutter vs. Incandescent Light & Power Company et al.—and went to the third floor of the building yesterday, and found nothing; I found a few of these papers, which are the pleadings, but could not find any record book or any minutes or books or papers of any kind relating to The Incandescent Light & Power Company.

The building, to which I went to make my search, is the building that was constructed after the old court house was injured by fire. The overflow files are now kept in the attic of the new building. I looked for files both in the attic and the clerk's office. I was acquainted with the late C. L. Kennan, who was the master in the Cutter case. He died two or three years ago.

No cross examination.

Thereupon, the defendant offered in evidence the

DEPOSITION OF JOHN R. BERRY,

who testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I am clerk of courts of Huron County and have in my possession and under my control records of pending cases, and the files of the older cases and all records. The bound volume, to which you have called my attention, is Volume 22 of Appearance Docket of Huron County Common Pleas Court, which is a record kept in my office. In the appearance docket is entered the appearance of all cases filed in the Court of Common Pleas. Case No. 3994, at page 53, is the case of George Cutter vs. The Incandescent Light & Power Company, of Norwalk, Ohio, and Thomas Dunmore, and others. The filing date is March 9, 1893.

Volume 54 of the Law Record of said Court of Common Pleas is one of the books under my control and is a record of the proceedings of the case in the Court of Common Pleas. The case of George Cutter against The Incandescent Light & Power Company, and others, commences at page 390 and extends to page 421.

At the request of counsel, I made a search for original papers, exhibits and documents among the files in my possession, and could find nothing, excepting the files, which are the pleadings in the case. We found no exhibits and could not find any books or records of The Incandescent Light & Power Company, or any other papers. In other words, I could find nothing, except the pleadings, and I made my search in our office, in our files, and in the room used by me in the attic for the storage of the papers. Mr. C. E. Tucker, the former clerk, assisted me in making the search.

No cross examination.

RECAPITULATION OF OFFERING AND ADMISSION OF EXHIBITS

No objection was offered by either party to the admission of any exhibits upon the ground of lack of authenticity or incompetency. All objections to exhibits were upon the ground of irrelevancy or immateriality. Where it is stated hereafter that there was an objection to the admission of an exhibit it is to be understood that it was upon the ground that such exhibit is immaterial and irrelevant to the issues of this case, as more particularly hereinabove set forth.

Plaintiff's Exhibits 1 to 47 were offered and admitted at the opening of the hearing. Defendant objected to that portion of Exhibit 1 which refers to the payment of taxes by the Ohio Electric Power Company and its predecessors and was allowed an exception to the admission of that portion of the exhibit.

Plaintiff's Exhibit 48 was offered and admitted in connection with the testimony of John F. Kreider (page 89, supra).

Plaintiff's Exhibits 49 and 50 were offered in connection with the direct examination of Alfred B. Greenfelder (page 131, supra) and were admitted.

Plaintiff's Exhibits 51 to 69 were offered in connection with the direct examination of Dwight E. Turkle (page 94, supra). They were admitted over the objection of the defendant and defendant was allowed an exception in respect to such admission.

Defendant's Exhibits A and B were offered in connection with the cross examination of Dwight E. Turkle (pages 100 and 101, supra). Defendant's Exhibit A was admitted without objection. Defendant's Exhibit B was admitted over the objection of the plaintiff and the plaintiff was allowed an exception to such admission.

Defendant's Exhibit C was offered in connection with the cross examination of William Insull (page 120, supra) and was admitted over the objection of the plaintiff and the plaintiff was allowed an exception to such admission. Plaintiff before the end of the trial withdrew its objection to that part of Exhibit C beginning with the words "Property Section" and from there on to the end of it, but insisted upon its objection to the rest of the exhibit.

Defendant's Exhibit D was offered in connection with the cross examination of William Insull (page 121, supra) and was admitted.

Plaintiff's Exhibits 70 to 75, inclusive, were offered and admitted at the close of plaintiff's case in chief.

Defendant's Exhibits E, F, G, H, I, and J were offered at the opening of defendant's case. Exhibits E and J were admitted without objection by the plaintiff. Defendant's Exhibits F, G, H, and I were admitted over the objection of plaintiff's counsel and plaintiff was allowed an exception to such admission.

Defendant's Exhibits K, L, M, N and O were offered in connection with the direct examination of M. G. Irvin (page 151, supra). The plaintiff objected to all of these exhibits. Exhibit M was admitted generally and Exhibits K, L, N, and O were admitted as illustrative of the testimony of the witness, the plaintiff being allowed an exception to the admission of such exhibits.

Defendant's Exhibit P was offered in connection with the direct examination of M. G. Irvin (page 162, supra) and was admitted over the objection of the plaintiff and the plaintiff was allowed an exception.

Defendant's Exhibit Q was offered in connection with the direct examination of Warren D. Spengler (page 168, supra) and was admitted over the objection of the plaintiff. The plaintiff was allowed an exception to such admission.

Defendant's Exhibit R, being the copy of the testimony of John R. Berry in the case of State of Ohio ex rel. Martin, was admitted pursuant to stipulation of counsel and is contained in the narrative transcript as a part thereof at page 206, supra.

Defendant's Exhibit S, being a copy of the testimony of C. E. Tucker in the case of State of Ohio ex rel. Martin, was admitted pursuant to stipulation of counsel and is contained in the narrative transcript of the evidence as a part thereof at pages 204 and 205, supra.

Plaintiff's Exhibit 76 was offered in connection with the direct examination of L. B. Fauver (page 180, supra) and was admitted over the objection of the defendant. The defendant was allowed an exception to such admission.

Plaintiff's Exhibit 77 was offered in connection with the direct examination of L. B. Fauver (page 183, supra) and was admitted over the objection of the defendant as to the materiality and relevancy thereof, and the defendant was allowed an exception.

Plaintiff's Exhibits 78 and 79 were offered in connection with the direct examination of Leland E. Yeager (page 190, supra) and were admitted over the objection

of the defendant. The defendant was allowed an exception.

Plaintiff's Exhibit 80 was offered in connection with the examination of Robert L. Christian (page 193, supra) and was admitted.

Plaintiff's Exhibit 81 was offered in connection with the direct examination of L. J. Wolf and was admitted.

Plaintiff's Exhibit 82 was offered in connection with the direct examination of A. A. Ruffing (page 200, supra) and was admitted.

Plaintiff's Exhibit 83 was offered at the close of plaintiff's rebuttal evidence and was admitted without objection for the limited purposes as stated above (page 200). Plaintiff's Exhibit 84 was offered and admitted at the close of plaintiff's rebuttal evidence over the objection of the defendant that it was irrelevant and immaterial, and defendant reserved an exception to its admission.

Defendant's Exhibit T was offered at the close of the case and was admitted over the objection of the plaintiff. The plaintiff was allowed an exception to such admission.

Defendant's Exhibit U was offered in connection with the reading of the deposition of Charles Suhr and was admitted without objection (page 58, supra).

ORDER

(Filed Nov. 30, 1931)

This cause came on to be heard upon the objections and proposed amendments by plaintiff-appellee to the narrative statement of evidence, whereupon plaintiff-appellee withdrew items 2 and 3 of said objections and proposed amendments, and the court being fully advised in the premises,

It is ordered, adjudged and decreed as follows:

1. The first sentence in the third full paragraph on page 66 of the narrative shall be changed to read as follows:

"I do not have any knowledge about whether in a report made by Ohio Electric Power Company to the Tax Commission of Ohio for the year ending January 1, 1930, all the property of Ohio Electric Power Company in Huron County was returned at a valuation of $19,632.99."

2. In lieu of the sentence beginning "I observed an omission there" in the 10th line from the bottom of page 116 and continuing to the end of the paragraph, there shall be substituted the testimony verbatim as it appears in the transcript of testimony at page 356 beginning "Q. I take it, then * * *" and ending on page 357 "The Witness: I will tell you in a second. $14,550.00 more makes a total of $124,294.00."

3. The reproduction of parts of the testimony of various witnesses in their exact words in the narrative statement of evidence as lodged and amended and as requested by both parties, is hereby directed, allowed and approved.

4. The narrative statement of evidence heretofore lodged by the defendant on September 30, 1931, with the amendments set forth in document entitled "Amendment to Narrative Statement of Evidence" heretofore approved by both parties and filed November 21, 1931, and with the amendments set forth above, is hereby allowed and approved, and upon the correction thereof by the defendant, is hereby ordered filed as a statement of evidence to be included in the record on appeal in the above cause, as provided in paragraph "B" of Equity Rule 75.

Geo. P. Hahn,
District Judge.

Dated November 30, 1931.

Approved:

Earl F. Boxell,
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MEMORANDUM OPINION

(Filed Feb. 7, 1931)

Hahn, J.:

This is an action for an injunction for the purpose of enjoining and restraining the defendant, its officers, officials, agents, employees and representatives from interfering with or interrupting the continued operation of the plant and electrical distribution system of The Ohio Electric Power Company in the streets, alleys and other public places in the City of Norwalk, &c.; and likewise from taking any steps or proceedings to carry into effect the judgment and decree of The Supreme Court of Ohio, entered in Ohio Electric Power Company vs. State (1929), 121 O. S. 235, 167 N. E. 877.

It has been stipulated in this case that the population of the City of Norwalk, as shown by the United States census, is and has been as follows:

Year	Number
1890.....	7195
1900.....	7074
1910.....	7858
1920.....	7379
1930.....	7775

Early in 1890 a partnership was organized by six men styled "The Norwalk Incandescent Light Company" for the purpose of generating and furnishing electricity in the City of Norwalk. Only one member of that partnership survives. He is Charles Suhr, whose testimony is in this case.

On October 7, 1890, upon application of the partnership, the City of Norwalk by its council passed an ordinance entitled: "An Ordinance to Amend an Ordinance Entitled: An Ordinance to grant certain privileges as therein set forth to the Incandescent Lighting Company of Norwalk, Ohio, passed July 30, 1890."

This ordinance is Exhibit "B" attached to the second amendment and supplement to the bill of complaint. After the passage of the ordinance of July 30, 1890 (which was identical with the October 7th ordinance except the earlier ordinance provided for the use of the Heisler system of incandescent lighting, and this system proved to be impracticable), the partnership had constructed a plant for the generation of electricity on a parcel of real estate that it had rented and had practically completed the erection of a distribution system throughout the City of Norwalk consisting of lines of poles and wires and the usual attachments therefor.

The ordinance of October 7, 1890, ran to the partnership, The Norwalk Incandescent Light Company, its successors and assigns and expressly "granted for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks and alleys and public grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city" upon certain conditions and provisions set forth in such ordinance.

The undisputed testimony of Judge Suhr is that the ordinance of October 7, 1890, was expressly accepted by a representative of the partnership immediately after its passage and that, within a short time thereafter, the construction of the distribution system was completed and the entire electric plant of the Norwalk Incandescent Light Company put in operation for the purpose of supplying the City of Norwalk with street lighting and the inhabitants thereof with electricity for domestic and commercial use; that the electricity for street lighting was conducted from the generating plant and distributed throughout the city by direct current over wires stretched for such purposes and that the electricity for domestic and commercial use was taken out of the generating plant over other wires designed to carry an alternating current, and both sets of wires were attached to and sustained by the same pole lines. In other words, the testimony of Judge Suhr, and that of all other witnesses, show that on each street of the city the same pole line carried and supported both sets of wires.

In March, 1891, the partnership was succeeded by a corporation styled "The Incandescent Light & Power Company," which was organized and incorporated by the members of the partnership and one or two others for the purpose of "furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, electric and steam power and steam and electricity for heating, for profit."

A copy of the Articles of Incorporation of The Incandescent Light & Power Company is Exhibit 3 in the record of this case. The testimony of Judge Suhr that the partnership transferred to the corporation, The Incandescent Light & Power Company, all the partnership property, including the franchise of October 7, 1890, is undisputed.

The corporation took up and continued the operation of the generating plant and the use of the distribution system in connection therewith, the same as they had been operated and used by the partnership and so continued until the 25th day of February, 1893, when, on account of financial trouble, The Incandescent Light & Power Company filed, in the Probate Court of Huron County, Ohio, a deed of assignment covering and conveying "all its lands, tenements, goods, chattels, choses in action, claims, interests, and property of every nature and kind whatsoever" to J. W. Foster and F. H. Jones, as assignees, for the benefit of the creditors of The Incandescent Light & Power Company under the insolvency laws of Ohio.

It has been stipulated herein (Exhibit 71) that certain litigation arose in the Probate Court respecting the priority of the liens of certain creditors; that the case entitled: "The Norwalk Foundry & Machine Company vs. Foster and Jones, Assignees," in which these controversies arose, was appealed from the Probate Court to the Court of Common Pleas of Huron County; and that an order of sale had been issued directing the assignees to sell at public sale the leasehold estate on which the electric plant was located "and all franchises, patronage, good will, and rights of said business." Pursuant to said order of sale Foster and Jones, as assignees, on the first day of March, 1895, sold *all* the property of the Incandescent Light & Power Company to the highest bidder therefor, George P. Jones and Mayme C. Foster, for $13,000. The property ordered sold was described as follows, to-wit:

"An electric light plant, consisting of a leasehold estate for the period of five years from the 22nd day of September, 1890, of the following described property: Situated in the County of Huron, City of Norwalk and State of Ohio, and being forty feet off the east end of Lot No. 934, situated on the southeast corner of Benedict Avenue and Seminary Street in said city, with privilege of drive on east end of said Lot No. 934, together with all buildings thereon, boilers, engines, dynamos, street wires, poles, lamps and all appliances and articles of every kind and description used in and about the business of furnishing arc and incandescent lighting and heating and all *franchises*, patronage, good will and rights of said business." (Italics supplied.)

March 7, 1895, the assignees of the Incandescent Light & Power Company executed and delivered a deed to George P. Jones and Mayme C. Foster for the con-

veyance of the above described property to them, their heirs and assigns. The property conveyed was described in the same language as above set forth.

April 30, 1895, George P. Jones, Mayme C. Foster and others organized a corporation under the laws of Ohio, styled "The Northern Electric Company" for the purpose "of manufacturing and producing electricity for light, heat and power" and with a provision in the articles of incorporation that the corporation was to be located at the City of Norwalk.

May 20, 1895, the same property described in the same language was conveyed by Jones and Foster to The Northern Electric Company.

July 16, 1895, the City of Norwalk entered into a written contract with The Northern Electric Company for lighting the streets and public places of the city for a period of ten years commencing September 1, 1895, such contract being Defendant's Exhibit "G" in this record. The contract provided that the company should build and continually keep in operation for the period of ten years a first class electric light plant. A generating plant was built by The Northern Electric Company on or near Water Street in the City of Norwalk and that generating plant is the same plant referred to in the bill of complaint herein and is now used by The Ohio Electric Power Company for "standby" or emergency purposes.

On June 28, 1897, by amendment of its articles of incorporation, the corporate name of The Northern Electric Company was changed to "The Northern Gas & Electric Company" and its purposes broadened "so as to modify and enjoy the objects and purposes for which said company was organized by authorizing and empowering said company to sell or otherwise dispose of electricity for light, heat and power purposes, and to manufacture and sell, or otherwise dispose of gas for fuel, heating, power or other purposes."

While The Northern Gas & Electric Company was operating its generating plant and the electrical distribution system in connection therewith, another corporation known as "The Norwalk Gas & Electric Company" was incorporated on the 17th day of April, 1900, "for the purpose of manufacturing, producing, furnishing and selling gas and electricity, or either, for light, heating, power and other purposes, and for doing all things incident to said purposes."

On May 8, 1900, The Northern Gas & Electric Company executed and delivered to the Norwalk Gas & Elec-

tric Company a deed conveying the tangible property of the former to the latter and also all the intangible property of the former covered by the following language:

"And also all and singular the tenements, hereditaments, and appurtenances belonging or in any wise appertaining unto the aforesaid property, *rights, franchises and privileges,* and the reversions, remainders, rents, issues and profits thereof." (Italics supplied.)

The operation of the generating plant and the distribution system was then taken up and continued by The Norwalk Gas & Electric Company until February 14, 1903, when it sold and conveyed the above described property to The Cleveland & Southwestern Traction Company and included in such description the following language:

"Also all the other property, real, personal and mixed, and all the franchises, rights and privileges which it now owns."

In the instrument of transfer from The Norwalk Gas & Electric Company to The Cleveland & Southwestern Traction Company there was an express assumption by the Traction Company of the lighting contract which had been entered into on the 16th day of July, 1895, by and between the City of Norwalk and The Northern Electric Company.

No further transfer of The Norwalk Electric light generating and distribution system and franchise connected therewith appears prior to the date of the expiration of the term of twenty years, provided for in said ordinance of October 7, 1890. The street lighting contract hereinbefore mentioned to commence September 1, 1895, expired on the 31st day of August, 1905, and in anticipation of the expiration of that contract on the 13th day of April, 1905, The Cleveland & Southwestern Traction Company entered into a public lighting contract (Exhibit H) with the City of Norwalk to commence at the expiration of the former contract, to-wit: September 1, 1905, whereby The Cleveland & Southwestern Traction Company agreed to maintain and operate one hundred or more arc lights for street lighting in the City of Norwalk, and to furnish incandescent lighting for the public offices and buildings, with certain conditions and provisions respecting the maintenance of the distribution system for the purposes of carrying out the contract.

The same system of poles and wires which were used by The Northern Electric Company for lighting the streets and public buildings of the City of Norwalk un-

der the contract of July 16, 1895, and by The Cleveland & Southwestern Traction Company under the public lighting contract of April 13, 1905, were used by the respective companies and their successors to furnish and provide patrons electricity for private and commercial purposes. The contract of April 13, 1905, between The Cleveland & Southwestern Traction Company and the City of Norwalk was executed prior to the expiration date (October 7, 1910) of the franchise ordinance of October 7, 1890. The public lighting contract extended for a period of five years after such expiration date.

The evidence shows that The Ohio Electric Power Company and its predecessors, to-wit: The Cleveland, Southwestern Railway & Light Company, The Cleveland, Southwestern & Columbus Railway Company, The Cleveland & Southwestern Traction Company, The Norwalk Gas & Electric Company, The Northern Electric Company (also known as "The Gas & Electric Company"), George P. Jones and Mayme C. Foster, The Incandescent Light & Power Company and the partnership, The Norwalk Incandescent Light Company, have all used the same distribution system, namely, the same poles and wires and other attachments as were originally constructed in the streets of the city by the partnership, and that the same property is now in the streets save as replacements have been made on account of decay and depreciation; and that The Cleveland, Southwestern Railway & Light Company and The Ohio Electric Power Company have come into the situation since the franchise of October 7, 1890, expired. The evidence further shows that since the contract of April 13, 1905, which went into effect September 1, 1905, the City of Norwalk has never executed nor entered into any street lighting or franchise agreements with any corporation, association, or person, and further, that no franchise ordinance of any kind has been passed by the council of the City of Norwalk since the 7th day of October, 1890. On July 1, 1924, the council of the City of Norwalk enacted an ordinance regulating the construction and maintenance of electric light and power wires, telephone signal and trolley wires within the corporate limits of the city; and that at the date of the passage of said ordinance wires coming within the provisions of the ordinance were maintained and operated by the Ohio Electric Power Company, or its predecessors, and by the following companies: The Norwalk Telephone Company, The American Telephone & Telegraph Company; The Ohio Bell Telephone Company, The Western Union Telegraph Company, The Lake

Shore Electric Railway Company, The Sandusky, Norwalk & Mansfield Electric Railway Company, and The New York Central Railway telegraph lines, and The Wheeling & Lake Erie Railway telegraph lines, and that in addition thereto the City of Norwalk was maintaining its wires for the distribution of electrical energy.

On March 23, 1926, the council of the City of Norwalk passed a resolution requiring the Ohio Electric Power Company to remove from the streets, alleys, and other public places of the city its electrical equipment erected thereon within thirty days thereafter. On May 18, 1926, said council, upon failure of the Ohio Electric Power Company to remove its equipment, passed a resolution ordering that complaint be filed with Edger G. Martin, Prosecuting Attorney of Huron County, Ohio, requesting such officer to take such legal steps as might be provided by the laws of the State of Ohio in quo warranto to oust the Ohio Electric Power Company from the streets, alleys, and public places of the city.

On May 19, 1926, said Edgar G. Martin, as Prosecuting Attorney, filed, in the Court of Appeals of Huron County, Ohio, a petition in quo warranto against the Ohio Electric Power Company alleging, among other things, that said company had assumed and used, and was then using, certain franchise rights and privileges without lawful authority therefor and without the consent or authority of the State of Ohio or said city, and praying that the Ohio Electric Power Company be required to answer by what warrant it occupied the streets, alleys, and public places of the city, and that it be ousted from using the same. Issue to said petition was made by the filing of an answer thereto by the Ohio Electric Power Company, followed by an amended answer filed in said Court of Appeals on March 21, 1928, wherein it was expressly admitted that the Ohio Electric Power Company had erected and maintained poles, wires, and other electrical equipment in the streets, alleys, and public places of said city for the purpose of doing a commercial and private lighting business therein, and claiming that it was so doing by virtue of rights granted to it by the State of Ohio and the City of Norwalk.

On June 7, 1928, the action in quo warranto, wherein the State of Ohio was plaintiff and the Ohio Electric Power Company was defendant, was submitted to said Court of Appeals on the pleadings and the evidence, and thereupon said Court of Appeals found, upon the issues joined, in favor of the State of Ohio, and decreed and ordered that the Ohio Electric Power Company be ousted

from continuing the use and occupation of the public streets, lanes, alleys, avenues, and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy-wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes, and from using and exercising any and all said franchise rights and privileges within the city limits of the said City of Norwalk, Ohio; provided, however, that said decree and order of ouster should not become effective until on and after the first day of September, 1928.

Thereafter, and within due time, a motion for a rehearing and a new trial was overruled by said Court of Appeals, and thereafter proceedings in error were instituted in the Supreme Court of Ohio by The Ohio Electric Power Company to review the proceedings and judgment in ouster of said Court of Appeals, and, as indicated in the bill of complaint filed herein, the Supreme Court of Ohio reviewed the said proceedings and judgment in ouster of said Court of Appeals, and after due and prolonged consideration, on the twelfth day of June, 1929, affirmed said judgment and issued a mandate to said Court of Appeals to carry said judgment and order of ouster into execution.

On July 30, 1927, the Director of Public Service of the City of Norwalk, acting by and through M. G. Irvin, superintendent of the light and water department, served notice upon the local telephone company, by letter of that date (Plaintiff's Exhibit 62) to remove twenty-one poles "located on the south side of West Main Street, from Church Street to the pole approximately two hundred feet west of Pleasant Street." Some or all of these poles were also used by The Ohio Electric Power Company. The notice purports to have been served in accordance with the ordinance of July 1, 1924. The telephone company took no action to remove the poles as requested. There was at that time an agreement between counsel for the city and counsel for The Ohio Electric Power Company that the lines, poles, etc., of the latter would not be interfered with by the City of Norwalk pending the litigation already referred to above.

On the night of October 25, 1927, Mr. Irvin, the superintendent, notified workmen employed under him by the City of Norwalk to be on hand during the early hours of the morning of October 26 at the point where the above twenty-one poles were located. When they arrived upon the scene, he ordered them to remove cer-

tain poles and, before they were stopped, nine or ten of these poles were removed, to the great detriment and injury of The Ohio Electric Power Company. Mr. Irvin testified that his reason for proceeding in the above manner was twofold: he claims that the men were too busily engaged on other city work to do this work at any other time, and he testified he feared the opposition of the local telephone company.

Plaintiff in this action was not a party to the quo warranto proceedings in the state court and its right to maintain this action has not been questioned. There can be no doubt that it "is free to maintain the present action unembarrassed by the decree in the other." Old Colony Trust Company vs. Omaha, 230 U. S. 100, 122, 57 L. Ed. 1410, 1419. The latter case cites with approval Louisville Trust Company vs. Cincinnati (C. C. A. 6), 76 Fed. 296 (certiorari denied, 164 U. S. 707) which is to the same effect.

A determination of this case involves a construction of statutes of the State of Ohio, franchise rights granted pursuant thereto and contracts entered into between the predecessor corporations of the plaintiff and the City of Norwalk. It must be determined whether and to what extent, in a case involving diversity of citizenship, this court should follow the decisions of the Supreme Court of Ohio. And if it follows the latter decisions, will it follow the later decisions or those earlier decisions which had established the law when the rights of the plaintiff accrued and attached?

The general rule is stated in Black and White Taxi Co. vs. Brown & Yellow Taxi Co. (C. C. A. 6), 15 F. (2d) 509, at p. 513, where Judge Knappen said:

"It is also the settled rule that, while the decisions of the state courts in construing the Constitution and Statutes of the state, or in passing upon questions of purely local usage, are binding upon the federal courts, unless they conflict with the Federal Constitution or a Federal Statute, or are dealing with rules of general or commercial law, yet when the question is one of general or commercial law, the federal courts, while treating the decisions of the state courts with attention and respect, and (as has been said) with an inclination to follow them so far as persuasive, will nevertheless ultimately exercise their own independent judgment in deciding the cause. This proposition is elementary."

In this case, however, the lien of plaintiff's mortgage attached and had been perfected by May 25, 1925, and plaintiff contends that this case must be decided upon

the law as it was settled by the decisions of the Supreme Court of Ohio at that time, and that this court should not follow the decision of the latter court in Ohio Electric Power Company vs. State, ex rel. Martin, Prosecuting Attorney (1929), 121 O. S. 235, 167 N. E. 877.

Counsel for plaintiff relies upon the case of Louisville Trust Co. vs. Cincinnati (C. C. A. 6), 76 Fed. 296, 300, 302 (certiorari denied, 164 U. S. 707; and approved and followed upon the point here involved in Kuhn vs. Fairmont Coal Co., 215 U. S. 349, 364, 54 L. Ed. 228, 236), a leading case which points out exceptions to the general rule that the federal courts follow the decisions of state courts construing state statutes. The exception to the general rule was involved in Moore-Mansfield Construction Co. vs. Electric Installation Company, 234 U. S. 619, 58 L. Ed. 1503. In that case at page 625 Mr. Justice Lurton said:

"Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States Court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case the Federal Courts, while leaning to the view of the state court as to the validity of interpretation of a law of the state, will exercise an independent judgment, and will not necessarily follow state judicial decisions rendered subsequently. Burgess vs. Seligman, 107 U. S. 20, 33, 27 L. Ed. 359, 365, 2 Sup. Ct. Rep. 10; Loeb vs. Columbia Twp., 179 U. S. 479, 493, 45 L. Ed. 285, 291, 21 Sup. Ct. Rep. 174.

"Under the settled rule it was the *duty* of the court below, when confronted with the question whether appellant had acquired a lien under the Act of 1883, to determine for itself the meaning and scope of that Act, and to declare the rights of that company under the law as it had been judicially determined." * * *

The latest statement of this exception to the general rule was by Mr. Chief Justice Taft, in Tidal Oil Co. vs. Flanagan (1924), 263 U. S. 444, 452, 68 L. Ed. 382, 386. He said, in part:

"In such cases the Federal Courts, exercising jurisdiction between citizens of different states, held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made, rather than in later decisions. They did not base this conclusion on Article 1, Section

10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third article of the Federal Constitution, they were empowered to do. Burgess vs. Seligman, 107 U. S. 20, 27 L. Ed. 359, 2 Sup. Ct. Rep. 10. In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law; but where gross injustice would otherwise be done, they followed the earlier rather than the later decisions as to what it was." * * *

See also Note 40, L. R. A., N. S., 380, at page 396.

Invoking this well-settled rule plaintiff relies upon Hardin-Wyandot Lighting Company vs. Upper Sandusky (1916), 93 O. S. 428, 113 N. E. 402, as affirmed (1919) in 251 U. S. 173, 64 L. Ed. 210, and the cases cited in that opinion of the Supreme Court of Ohio. In the opinion of this court if the latter cases were determinative of the rights of the plaintiff at the time its lien attached, it is under the foregoing authorities the clear duty of this court to follow these earlier decisions rather than a later decision of Ohio Electric Power Company vs. State, ex rel. Prosecuting Attorney (1929), supra, even though, as ably argued by defendant's counsel, the latter decision is the correct exposition of the law of this state.

Plaintiff claims that the franchise rights of The Ohio Electric Power Company, its mortgagor, depend upon direct grants from the State of Ohio to predecessor corporations of said mortgagor company. The grants relied upon are those by the State of Ohio to The Incandescent Light & Power Company in 1891, and to The Northern Electric Company in 1895. Defendant claims that the franchise rights of plaintiff's mortgagor were derived by and through, and only by and through a grant from the City of Norwalk by a twenty-year franchise evidenced by the ordinance of October 7, 1890 (Exhibit 35) which, may have been extended by the two street-lighting contracts entered into September 1, 1895 (Exhibit G), and September 1, 1905 (Exhibit H). The latter contract expired August 31, 1915; and the defendant claims that, at the latest, the right of plaintiff's mortgagor and its predecessor corporations to occupy the streets, &c., of the City of Norwalk terminated upon the latter date, both because of the time limit of said contract (Exhibit H) and the express terms of Paragraph 14 of that contract.

The legislative grants relied upon by plaintiff and and the ordinance of the City of Norwalk were granted between the years 1887 and 1896. Franchises granted to lighting and power companies between the above years,

because of the statutes in force only during that period, have a unique standing and constitute a separate class among the franchises granted pursuant to the laws of this state. To understand the decisions relied upon, it is necessary to have clearly in mind the statute of 1886 and the statutes in force between 1887 and 1896, and the relation of these statutes to each other.

Because a later controlling statute is supplementary to the statutes relating to magnetic telegraph companies as found in the Revised Statutes of 1880, it is necessary to begin this review of the statutes by considering certain of the latter statutes. Title II of the Revised Statutes of 1880 related generally to the subject of corporations. Chapter I related to "Creating of Corporations and General Provisions." Chapter IV related to "Magnetic Telegraph Companies." The remaining fifteen chapters of Title II related to special kinds of corporations. Chapter IV, relating to "Magnetic Telegraph Companies," consisted of Sections 3454 to 3471, inclusive. The statutes of 1880 which it is necessary to have in mind are Sections 3454, 3461 and 3471. They are as follows:

"Sec. 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

"Sec. 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the Probate Court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, *so as not to incommode the public in the use of the same;* but nothing in this section shall be construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any

line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies."

There was no provision in the Revised Statutes of 1880 relating to electric light and power companies (Lighting Co. vs. Upper Sandusky, 93 O. S. 428, 438).

On May 12, 1886 (83 O. L. 143), the legislature passed an act (1) authorizing electric light and power companies to construct their lines

"* * * * for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, *with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe.*"

(Formerly Revised Statutes of 1890, Section 8752; now General Code, Section 9195.)

It is the claim of the defendant in this case that the ordinance of the City of Norwalk enacted October 7, 1890, was passed pursuant to power vested in the city council by the above statute, and that by taking an assignment of rights under that ordinance, the franchise rights of the Ohio Electric Power Company were limited as to time by the terms of that ordinance.

On January 26, 1887 (84 O. L. 7), the legislature enacted an act supplementary to Sections 3454 to 3471 of the Revised Statutes of Ohio of 1880, as follows:

"Section 3471-a. The provisions of this chapter so far as the same may be applicable, *shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.*"

The plaintiff claims that the act just quoted by implication repealed the act of May 12, 1886 (83 O. L. 143). The defendant on the other hand claims that there was no repeal of the former act by the latter.

The next general revision of the statutes of the State of Ohio was that of 1890. In those statutes Title II remained in a general way as it was in the Revised

(1) Because of certain contentions this act is set out in full at the end of this opinion.

Statutes of 1880, and Chapter IV bore the heading "Magnetic Telegraph Companies." To these was added Section 3471-a, which was the act of January 26, 1887 (84 O. L. 7), just referred to. Sections 3454 and 3461 of the Revised Statutes of 1890 remained identical with statutes bearing those numbers in the Revised Statutes of 1880.

The act of May 12, 1886 (83 O. L. 143), upon which the defendant in this case strongly relies, became Sections 8752 and 8753 of the Revised Statutes of 1890. There having been no express repeal of this act by the legislature, the same was carried verbatim into Part Fifth of the Revised Statutes of 1890, which was the "Uncodified" part of the Revised Statutes of 1890.

Thus the statutes stood at the time of the passage of the ordinance of October 7, 1890, and the incorporation of The Incandescent Light & Power Company and The Northern Electric Company, incorporated respectively in 1891 and 1895, the latter corporations being predecessor corporations of the Ohio Electric Power Company, and through these corporations the latter claims to derive the franchise rights upon which plaintiff relies in this action.

On April 21, 1896 (92 O. L. 204), the legislature enacted an act amending Section 3471-a of the Revised Statutes as enacted January 26, 1887 (84 O. L. 7), as follows:

"Section 3471-a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. *Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating, or power purposes through the street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality;* and this inhibition shall extend to all levels about and below the surface of any such public ways, grounds or places as well as along the surface

thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any Probate Court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and this act shall apply to actions and causes of actions or proceedings named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any Circuit Court of the states."

(Now General Code, Sections 9192, 9193 and 9194, the latter section being slightly revised, 101 O. L. 14, and amended 111 O. L. 182.)

The statutory provisions under which plaintiff's mortgagor's predecessor corporations were incorporated and under which the ordinance of October 7, 1890, was granted remained unaffected by any legislation until the passage of the above act of 1896.

It is not claimed that subsequent changes in the above statutes affect the rights of the parties in this action. The sections are now Sections 9170, 9178, 9179, 9191, 9192, 9192-1, 9193, 9194 and 9195 of the General Code of the State of Ohio, Subdivision II, Chapter 2, "Telephone and Telegraph."

It follows from the express terms of these statutes (unless the act of May 12, 1886 (83 O. L. 143), was not repealed by implication by the act of January 26, 1887 (84 O. L. 7)), that cases construing these statutes in cases involving magnetic telegraph companies and telephone companies are alike applicable to lighting and power companies.

What the powers and functions respectively of the state and municipality were under the above statutes (particularly Section 3461 of the Revised Statutes of 1890) first came before the Supreme Court of Ohio in a telephone case: Zanesville vs. Telegraph & Telephone Company, 64 O. S. 67, 59 N. E. 781 (a rehearing of the same case, which came to a contrary conclusion, reported in 63 O. S. 442). The question in that case was whether or not Section 3461 of the Revised Statutes of 1890, in so far as jurisdiction was vested in the Probate Court was unconstitutional, in that it vested legislative power in a court. In arriving at the conclusion that the

statute was constitutional, the court announced among others the following propositions of law in the syllabi and the opinion of the court (Republic Creosoting Co. vs. Boldt Const. Co. (C. C. A. 6), 38 F. (2d) 739, 740):

1. "It is competent for the state through its legislative department to grant to . . phone and telegraph companies organized under its authority, the right to construct their lines in the streets and municipalities" * * *. (Pp. 88 and 89.)

2. That under the express terms of Section 3454 of the Revised Statutes of 1890, corporations incorporated under the above statutes "obtained from the state franchises to construct and to maintain their lines from point to point upon and along any public road or highway * * * subject only to the limitation that the line shall not be so constructed as to incommode the public in the use of the roads and highways," &c. In short, these corporations are granted the right to *use* the streets not by the municipality, but by the state.

3. The only function of the municipality is to agree with the corporation as to the mode of use of the streets, &c., to the end that the public shall not be incommoded in the use thereof. The court said (pps. 80 and 81):

"It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the *mode* of such use that becomes the subject of agreement or judicial determination."

And page 83:

"The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of a municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company. The making of such agreement between the parties is not involved in the proceeding instituted in the court, nor is its action in that regard in any way invoked. The jurisdiction conferred on the court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys, so as not to incommode the public in the use of the same."

4. The purpose of requiring the consent of the municipality is to the end, only, that the public shall not be incommoded. This appears from quotations from the decision of the court already given, and it follows from the express wording of Section 3461 (R. S. 1890) which applies to the jurisdiction of the Probate Court, which is, "shall be exercised so as not to incommode the public in the use of the same." (To the same effect see Telephone Co. vs. Cincinnati, 73 O. S. 64, at p. 78.)

5. It seems to follow from the language of the court that a municipality may not impair or defeat the franchise grant of the state by insisting upon unreasonable or arbitrary terms as to the mode of use of the streets, &c. The court said (p. 82):

"The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by bona fide disagreement of the parties, a contingency not unlikely to occur; and hence, the necessity for the provision of Section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties."

Other decisions relied upon by the plaintiff are Farmer vs. Columbiana County Telephone Company (1905), 72 O. S. 526; and Queen City Telephone Company vs. City of Cincinnati (1905), 73 O. S. 64; but these cases are reviewed in the case mainly relied upon by the plaintiff, Hardin-Wyandot Lighting Co. vs. Upper Sandusky (1916), 93 O. S. 428, the latter case involving a lighting and power company.

In the latter case a corporation whose predecessor corporation had been organized and had received an ordinance granted from the Village of Upper Sandusky between 1887 and 1896, had established and maintained a lighting and power plant partly for public street lighting and partly for commercial purposes. Failing to agree with the village on rates for public street lighting, it abandoned that portion of its lines, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatsoever for the purpose of public lighting (p. 442). Thereafter, without procuring the consent of the village under the act of 1896, above quoted, the company sought to reestablish that portion of its system. The Supreme Court held that the lighting and power company had no right

to re-establish that part of its system without the consent of the municipality; but at the same time the court held that the village had no authority to annul its rights as to the other portion of its system which was devoted to commercial lighting purposes. The case fully reviews and discusses the prior decisions and the legislative acts already quoted in this opinion. The facts of this case are entirely analogous to the facts of the case at bar except in one particular. In that case the predecessor corporation had received an ordinance grant which had no limitation as to the length of time it was to remain in force. In this case the predecessor corporations received assignments of an ordinance grant which was limited to twenty years, originally granted to a partnership but running to the successors and assigns of such partnership. Since, however, this decision (the Hardin-Wyandot case, supra) is based solely upon the extent of the legislative grant, the point that the ordinances involved had different time limits seems to be wholly immaterial.

1. The conclusion which the court reached was based solely upon the character and extent of the rights under the legislative grant to the predecessor corporation of the lighting and power company between 1887 and 1896. While the statement of facts begins (at page 428) with a description of the municipal franchise granted to the predecessor corporation in 1889, it is clear from the opinion that the lighting and power company rested its rights solely upon the legislative grant to "its predecessor" (page 436, also page 439), and because of the incomplete state of the record in error proceedings in the Supreme Court, it did not pass upon the extent of the lighting company's rights under the ordinance. The court said (p. 442):

"However, as pointed out, the ordinance in question here was passed in 1889, while the act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it."

2. The decision of the Supreme Court of the United States, although fully acquiescing in the conclusion of the Supreme Court of Ohio (1a), discusses the

(1a) Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 251 U. S. 173, 64 L. ed. 210.

case as if the decision of the Supreme Court of Ohio, and as if its decision, were based upon the ordinance of 1889; at least no note is taken of the fact that the decision of the Supreme Court of Ohio is based solely upon the character and extent of the legislative grant to the predecessor corporations between 1887 and 1896. It may be assumed that the point as to whether or not the rights of the municipality rested upon the municipal ordinance or the legislative grant was not regarded as vital or controlling in the Supreme Court of the United States because the result in that court would have been the same whether the grant was from the municipality or from the legislature. There was "no limitation as to the length of time" in the municipal ordinance (93 O. S. 429), and, under the holdings of the Supreme Court of the United States, such an ordinance would have been a perpetual franchise. Northern Ohio Traction and Light Company vs. Ohio, 245 U. S. 574, 62 L. Ed. 484. It was important to rely upon and stress the legislative grant in the state courts because under the Ohio rule the ordinance would have been indeterminate, merely, extending only so long as the parties agreed thereto. East Ohio Gas Co. vs. Akron, 81 O. S. 33, 90 N. E. 40.

3. As to the act of January 26, 1887 (84 O. L. 7), it was said (p. 439):

"This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.'" * * *

And paragraph 1 of the syllabus, which was concurred in by all of the judges (6 O. S. Rule 6, page V) is as follows:

"The act of January 26, 1887 (84 O. L. 7), made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state."

If the light and power company involved in that case had power to maintain its plant as established without further consent of the municipality except perhaps as to extensions and enlargements, the same must be true of the Ohio Electric Power Company involved in this case,

if the Hardin-Wyandot case, supra, is to be followed, and, under the authorities, it must be followed.

4. The effect of the decisions is that the act of 1896 (92 O. L. 205), was a valid exercise of the police power. The Supreme Court of Ohio said:

"The purpose of the act of 1896, now Sections 9192, 9193 and 9194, General Code, *was to invest the municipality itself with power to make the grant.* It specifically excepts the provision of Section 3461, Revised Statutes, and it expressly provides that in order to subject the same to municipal control alone, no company shall place electric wires for lighting, heating or power purposes in the streets of the city or village without the consent of such municipality. The elimination of Section 3461, Revised Statutes, and the use of the word 'alone' abrogate the power of the Probate Court to act in such cases, and this is followed by the express provision requiring the consent of the municipality."

The Supreme Court of the United States said (251 U. S. 177, 178, 64 L. Ed. 213):

"From this state of the record we conclude that the State Supreme Court did not intend to deal *with the right of the company to maintain, repair, or replace such poles and wires as it was using for commercial lighting when the case was commenced*, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction 'until the consent of said village shall have been obtained'; and, so restrained, its judgment will be affirmed, based, as it is, upon the statute of 1896, which the court holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the state."

Without discussing the character and extent of the rights of the Ohio Electric Power Company under this decision it had at the time of the commencement of this action a present right (2) to maintain its lighting system

(2) Throughout the case plaintiff has claimed that the Ohio Electric Power Company as a "perpetual" franchise. The court does not think it necessary to decide whether the rights of the Ohio Electric Power Company are "perpetual," or whether it "had a present right to occupy the streets at the time of the commencement of this action." See State, ex rel. Taylor, vs. Columbus Ry. Co., 73 O. S. 363, affirming 1 O. C. C., N. S., 145, and quoted in Northern Ohio T. & L. Co. vs. Ohio, ex rel. Pontious, 245 U. S. 574, 584, 62 L. ed. 481, 488. Whether the Ohio Electric Power Company had one right or the other, the plaintiff had a right to maintain this action. If the last cited case, and Ohio Public Service Co. vs. Fritz, 274 U. S. 12, apply, as claimed by plaintiff, then its franchise may be "perpetual." On the other hand plaintiff's claims are based upon a legislative grant and under the Con-

for commercial purposes in the City of Norwalk, and to continue to use the streets of that city for that purpose "with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced." Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 251 U. S. 173, at page 177, 64 L. Ed. 210, at page 213. The predecessor companies of the Ohio Electric Power Company had agreed upon a mode of use of the streets of the City of Norwalk as early as the year 1890, and, there being no evidence to the contrary, it must be assumed that that mode of use was of such a character that the public has not been incommoded in the use of the streets up to the present time, unless the changes requested by the city under the ordinance of July 1, 1924, which were complied with by the company, were intended to, and did, bring about a mode of the use of the streets which does not now incommode the public. The Ohio Electric Power Company is therefore, under the Hardin-Wyandot case, entitled to continue to use the streets of the City of Norwalk and to maintain its commercial lighting system for that purpose unless one or more of the contentions of the city are well taken.

1. It is claimed on behalf of the City of Norwalk that during the period between the years 1887 and 1896, the City of Norwalk, under the Act of 1886, which was not expressly repealed, had full power and authority to grant a franchise for lighting purposes; that it did in fact grant such a franchise by the ordinance of October 7, 1890, which expired October 7, 1910; and that the only right which the predecessor companies of the Ohio Electric Power Company had was to occupy such streets under the above ordinance franchise; except that the grant may have been extended by implication by Exhibits G and H, which were the two lighting contracts entered into for periods beginning September 1, 1895,

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stitution of Ohio (1851), the legislature may have the reserve power to alter, revoke or amend the legislative grant. The constitutional provisions are quoted in Hamilton Gas, Light & Coke Co. vs. City of Hamilton, 146 U. S. 258, 269, 270, 36 L. ed. 963. What is here said is consistent with the comment in East Ohio Gas Co. vs. City of Cleveland, 106 O. S. 489, 504, 505, 140 N. E. 410, 414.

And see State, ex rel., vs City of Hamilton, 47 O. S. 52, 75, 76; and see especially the dissenting opinion of Judge Jones in State, ex rel., vs. Traction Company, 93 O. S. 466, 471, reversed in Northern Ohio T. & L. Co. vs. Ohio, ex rel., Pontius, 245 U. S. 574, 62 L. ed. 481.

It is unnecessary to decide, and the court has no intention of deciding, whether the Legislature has the claimed reserve power to alter, revoke or amend, or the effect the exercise of such claimed power would have under the facts of this particular case.

and September 1, 1905, the latter expiring on the 31st day of August, 1915. The contention ignores entirely the fact that the predecessor corporations, The Incandescent Light & Power Company and The Northern Electric Company, organized respectively in 1891 and 1895, received the right to occupy the streets of Norwalk for lighting purposes for an unlimited time, except as power resided in the legislature under constitutional provisions to alter or amend the law; and that the ordinance had no vitality under the decisions already discussed except insofar as it amounted to a consent to a mode of use which should not incommode the public (3). The predecessors of the Ohio Electric Company by the terms of the statute had a right to occupy the streets of Norwalk for an unlimited time the moment they were created, and before they had power to take an assignment of the ordinance. It seems entirely reasonable and logical to say that a corporation holding a grant for an unlimited time direct from the legislature would in no way cut down those rights by taking an assignment of an ordinance purporting to make a twenty-year grant, such grant being from a municipality which received its power to make the grant from the same legislature, but which

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(3) It is claimed in the briefs for the defendant, and stated in the Zanesville case (page 80) that the proceeding in the Probate Court under Section 3401, after failure of the company and municipality to agree, is an "appropriation proceeding." If seemingly contrary to the above, the real purpose of the agreement between the company and the municipality is, as indicated in the opinions of Judge Spear, in Farmer vs. Telephone Company, 72 O. S. 526, 542, and Telephone Company vs. Cincinnati, 73 O. S. 64, 81, that the municipality may exercise its statutory right of control, care and supervision of the streets (now Section 3714, General Code), is it not the police power that is involved, and in the language of Mr. Justice Pitney, in Atlantic Coast Line vs. Goldsboro Company, 232 U. S., 548, at page 558:

> "It is settled that neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable, even by express grant; and that all contract and property rights are held subject to its fair exercise."

In that view of the matter, was the agreement of the city contained in the ordinance of October 7, 1890 (Exhibit 35), binding upon the city for any purpose? Was it more than an initial exercise of the police power by the municipality effective until the municipality indicated that a different mode of use would be necessary and required? Must it not be assumed in this case that the mode of use initially indicated by the municipality was satisfactory, at least, until the passing of the ordinance of July 1, 1924 (Plaintiff's Exhibit 38)? The latter ordinance, applying to all companies, similarly situated, was an exercise of the police power. It was in every instance, upon request, complied with by The Ohio Electric Power Company and its predecessors (Exhibits 51 to 69, inclusive).

grant was wholly ineffectual except as it amounted to a consent to a mode of use.

2. It is contended on behalf of the City of Norwalk that under the holding of the Supreme Court of the United States in Bankers Trust Company vs. Raton, 258 U. S. 328, the predecessors of The Ohio Electric Power Company were estopped to claim a grant extending beyond the period of twenty years after the seventh day of October, 1910. In that case there were two statutes, an earlier one empowering cities to regulate waterworks if authorized by a majority of the voters or to grant the right to private individuals for a term not exceeding twenty-five years. There was also a later statute providing for the incorporation of water companies to supply water to municipalities, with power to occupy the streets of a municipality perpetually, subject to regulation by the municipal authorities. The company entered the municipality under an ordinance ratified by the citizens limiting its term to twenty-five years. It was held that the company was estopped by the muncipal ordinance from claiming a perpetual franchise under the later statute.

Many grounds for distinguishing this case have been suggested by counsel for the plaintiff in this case, but it seems unnecessary to consider them at length. It seems sufficient to say that none of the "conventional elements" of equitable estoppel are present here. It cannot fairly be said that there was any reliance by the city or any misleading by any of the companies. It is undisputed that about September 1, 1905, when the ordinance had at least five years more to run, the city entered into a new street lighting contract (Exhibit H) with the company. That street lighting contract did not expire by its terms until August 31, 1915, practically five years after the expiration of the ordinance of October 7, 1890 (Exhibit 35). In fact the city relied exclusively on the predecessors of Ohio Electric Power Company for electricity for all purposes until the municipal plant was established in about 1915. Further, no suggestion was ever made that the company had misled the city as to the extent of its rights. On the contrary, on July 1, 1924, the city passed an ordinance regulating the use of its streets by the Ohio Electric Power Company and all other companies similarly situated, and in many instances (see Exhibits 51 to 69, inclusive) demanded and received compliance with this ordinance. The city is far from being in the position that the city was in the Raton case, where an estoppel was claimed prior to or immediately upon the expiration

of the ordinance there involved. Here the claim is being made nearly twenty years after the expiration of the ordinance which it is claimed operated as an estoppel, and after the city had dealt with the company as already indicated.

3. It is claimed that by the terms of the last street lighting contract, dated April 13, 1905 (see defendant's answer, paragraph 21), which was entered into between the City of Norwalk and The Cleveland & Southwestern Traction Company, a predecessor of plaintiff's mortgagor (Exhibit H), the franchise rights of plaintiff's predecessor were waived and terminated. Reliance is placed upon the last paragraph of Paragraph 14, which is as follows:

"The said contractor, at the expiration of this contract, shall *upon the request of the city,* remove all poles, posts, lamps, wires and other apparatus or material of every kind or description from the streets, alleys and other places in said city, and restore said streets, alleys and other public places in as good condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred."

The contention is that this provision of the contract was intended to and did terminate the *franchise* rights of the Ohio Electric Power Company, and that from and after August 31, 1915, the Ohio Electric Power Company and its predecessors had no right whatsoever to occupy the streets of the City of Norwalk. It is admitted that during the entire time that this company and its predecessors occupied the streets of the City of Norwalk they furnished the street lighting for the city. This service therefore began about October 7, 1890, and extended for a period of about twenty-five years, to about August 31, 1915, all as a result of Exhibits 35, G and H; that practically no new poles, lines or equipment were added as a result of the contract dated April 13, 1905 (Exhibit H); and that during the period of the contract the company continued its lines and its equipment as it had theretofore maintained them (see Paragraph 10 of defendant's answer herein).

At the time of entering into this contract and for some years prior thereto the company had also been operating a commercial lighting system, as it is now operating the same, and it seems that a reasonable construction of this contract must be that it was intended to

deal with and dealt only with the public street lighting feature of the lighting company's business, and that it dealt only with the removal of new poles, posts, lamps, wires and other apparatus, installed for the purpose of carrying out the contract if any such were installed. There was no attempt to deal with the *franchise* rights of the company. If this contract were enforced at this belated time, the most that could be claimed for it would be that the company be required to remove poles, posts, lamps and wires, &c., which had been erected for the maintenance of its street lighting system to the end that the municipal plant of the City of Norwalk might take over this business.

But a more conclusive reason for holding that this contract does not affect the rights claimed by the plaintiff is that the contract purports to grant a right "at the expiration of this contract shall upon the request of said city." It seems to this court that this granted an option merely to the city which it was required to exercise at the time of the expiration of the contract or within a reasonable time thereafter. That the contract granted an option to the city seems to follow from the fact that the company was not required to act unless requested to do so by the city. If it had been the intention of the parties that the company surrender its *franchise* rights and be required to entirely vacate the streets for all purposes, including commercial lighting, at any time after the expiration of the contract, plain language indicating such an intent and purpose would have been chosen by the parties.

The right to the city was to make this request "at the expiration of this contract" and the court is therefore constrained to hold that such request should have been made upon the expiration of the contract or within a reasonable time thereafter, and that the city has waived any right which it had under the contract by delaying its request until about the year 1926 (about eleven years later), when ordinances or resolutions of the council for that purpose were enacted. 13 C. J. 630, Note 65; 4 Page on Law of Contracts, page 3553, Section 2054; 4 Page on Law of Contracts, page 3646, Note 29; 2 Williston on Contracts, Section 853, Note 95. The court would be constrained so to hold even if it had been shown in the evidence that the bondholders had notice of this contract (Exhibit H) and its provisions or were charged with notice thereof.

Although counsel claim that the resolutions of council (Plaintiff's Exhibits Nos. 41, 42 and 45), upon which

the action in the quo warranto proceedings in the state court were based, had reference to this contract, the resolutions do not show that fact. The gist of the petition in the Court of Appeals of Huron County may be gathered from the following paragraph:

"That said defendant has assumed and used and is now using said franchise rights and privileges as above enumerated, the same not having been granted to it by lawful authority and without the consent or authority of the plaintiff, the State of Ohio or the City of Norwalk."

It is claimed by the plaintiff here that not having specifically relied upon the contract in the resolutions adopted by the municipality, it is now estopped from relying thereon; citing Spitzer vs. Board of Trustees (C. C. A. 6), 267 Fed. 121; and Railroad Company vs. McCarthy, 96 U. S. 267, 24 L. Ed. 693.

4. The claim is made that because certain bonds were issued and sold after the commencement of the quo warranto proceeding in the state court, the court is bound to follow the later decision of the Supreme Court of Ohio in Ohio Electric Power Co. vs. State, supra, and not the earlier decision in Hardin-Wyandot Light Company vs. Upper Sandusky, supra. While it appears that the bonds subsequently issued were issued pursuant to the terms of the mortgage and supplemental mortgage (Exhibits 28 and 29), and that the same were in payment of bonds issued before the commencement of the quo warranto proceeding, it is not claimed that the mortgage lien which is sought to be enforced by the plaintiff was released or affected in any way. Accordingly the present bondholders are entitled to and in equity occupy the same position as the earlier bondholders. 3 Thompson on Corporation, 3rd Edition, Section 2343, Section 2403; Louisville Trust Company vs. Cincinnati (C. C. A. 6), 76 Fed. 296, 300; Farmers Loan & T. Co. vs. Meridian Waterworks Co., 139 Fed. 661, 670. Whether the law of the State of New York (Hill vs. Beebe, 13 N. Y. 556; Feldman vs. Beier, 78 N. Y. 293; In re Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521) or the law of the State of Ohio (Riegel vs. Belt, 119 O. S. 369, 378, 379, 164 N. E. 347, 350) is applicable, there was no payment or discharge of the mortgage now relied upon.

5. It is also claimed that this action should be dismissed because of the failure to join a necessary party defendant, to-wit: the State of Ohio, and the contention is based in part upon the fact that the quo warranto proceeding in the state court was conducted in the name of

the State of Ohio upon relation of the Prosecuting Attorney of Huron County. It does not follow, however, that because the quo warranto proceeding was begun in the name of the State of Ohio it had any interest in the proceeding. A quo warranto proceeding in Ohio is the only one which is appropriate in certain instances and, anomalously, it must always be begun in the name of the State of Ohio, which may have no interest whatsoever therein. It appears that in this case the State of Ohio has no interest whatsoever in this action. The Executive Department of the State of Ohio is not interested, and the Legislative Department, which may have reserve power to alter or to repeal the legislative grant, has not acted. The proceeding was begun not upon the initiative and suggestion of the State of Ohio or any of its officers, but as a result of a resolution of the council of the City of Norwalk (Exhibit 45) passed on the 18th day of May, 1926, requesting the Prosecuting Attorney of Huron County to begin ouster proceedings. They were begun and maintained under the auspices of counsel employed by the City of Norwalk solely for that purpose. Clearly the State of Ohio was neither a necessary nor a proper party to this action. (See also Exhibits 40 and 44.)

The court is not impressed with the explanation offered by Mr. Irvin, the superintendent, for proceeding surreptitiously and practically in the nighttime in removing nine or ten poles on the early morning of October 26, 1927. His testimony shows that he was in close touch with the situation, and he must have known of the agreement of counsel that there should be no interference with the property of the Ohio Electric Power Company pending the litigation in the state courts. He was and is keen to prevent competition with the city on the part of the Ohio Electric Power Company in the commercial lighting business in the City of Norwalk. The court is of the opinion that, unless restrained and enjoined by this court, there will be further interference with the property of The Ohio Electric Power Company pending litigation in the Federal Courts. The situation and feeling evidenced by the acts and conduct of Mr. Irvin have not been aided or allayed by the litigation in this court. The plaintiff is entitled to an injunction which, it is hoped, will prevent similar acts and a repetition of like conduct on the part of the city.

Entertaining the above views, this court has found it unnecessary to consider the effect of later decisions of the Supreme Court of Ohio, such as Ohio Service Co. vs.

State, ex rel., 113 O. S. 325 (June 2, 1925); reversed, 274 U. S. 12, 71 L. Ed. 899.

The court has also found it unnecessary to consider the effect of a series of conferences had in the fall of 1914 between the officials of the City of Norwalk and the officials of the Cleveland, Southwestern & Columbus Railway Company, some of them pertaining to meetings of the City Council of the City of Norwalk, and the effect of an initiative petition presented to the electors of the City of Norwalk, in October, of 1926, by The Ohio Electric Power Company. It seems to the court that neither the city nor The Ohio Electric Power Company was in any way estopped by their acts and conduct in asserting their legal rights as the court in this opinion finds them to exist; however, if either party desires further findings of facts, they should be formulated pursuant to Rule 34 of this court, and in accordance with Equity Rule 70½ of the Supreme Court of the United States; and in that connection the court calls the attention of counsel to the case of Lester Briggs vs. United States (C. C. A. 6), 45 Fed. 2d 479, decided December 11, 1930.

It is to be regretted if the conclusions of this court seem to conflict with those of the Supreme Court of Ohio in Ohio Electric Power Co. vs. State, 121 O. S. 235. However, if they do so conflict, this court is bound to follow the decisions of the Supreme Court of the United States, and of the Circuit Court of Appeals for the Sixth Circuit. It is to be noted also that the plaintiff in this action was not made a party to the proceeding in the state court, and its rights and equities were not brought to the attention of that court. No decision has been called to the attention of this court which indicates that the Supreme Court of Ohio, upon a showing of plaintiff's rights, would not have, under its prior decisions, continued the franchise rights of the Ohio Electric Power Company until the obligations of that company to its bondholders had been discharged and satisfied. (4)

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(4) And it is not unlikely that the decision of the Supreme Court of Ohio would have been in favor of the utility upon the vitally different record made in this case. That court's decision to a large extent is based upon the fact that no agreements other than the Ordinance of 1890 and the street-lighting contracts of 1895 and 1905 were ever entered into with reference to the use and occupancy of the streets. That court said (121 O. S., at page 239):

> "Concededly no franchise was ever granted and no agreement with reference to the use and occupancy of the streets ever entered into except as hereinbefore stated." * * *

In this case the answer of the defendant admits the enactment of the Ordinance of July 1, 1924 (Plaintiff's Exhibit No. 38), which is still in full force and effect. It applies to the Ohio Electric Power

An order may be entered accordingly and, in part, along the lines of the order entered in Old Colony Trust Company vs. City of Omaha, 230 U. S. 100, a certified copy of that order being in the hands of counsel.

Geo. P. Hahn,
Judge.

February 7, 1931.

|83 Ohio Laws, page 143, Act of May 12, 1886:

"AN ACT

to authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

"Section 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands, lanes, squares and public places in such city, village or town.

"Section 3. This Act shall take effect and be in force from and after its passage."

Company, and, as already noted, the city demanded and received full compliance with the ordinance on the part of the utility. The ordinance is tantamount to a consent to the use of the streets by the City of Norwalk. The record in the case in the Supreme Court of Ohio shows that the ordinance was never called to the attention of that court.

PERMANENT INJUNCTION
(Filed June 27, 1931)

This cause came on to be heard upon the bill of complaint, the amendment and supplement to bill of complaint, the second amendment and supplement to bill of complaint, and the third amendment and supplement to bill of complaint of the plaintiff, The Chase National Bank of the City of New York, it having been substituted as plaintiff herein for The Equitable Trust Company of New York, the original plaintiff, and the answer of the defendant, City of Norwalk, Ohio, to the bill of complaint, amendment and supplement to the bill of complaint and second amendment and supplement to the bill of complaint and upon the answer of said defendant to the third amendment and supplement to the bill of complaint, and the evidence, and was argued by counsel. Upon consideration whereof the court finds that the plaintiff is a citizen and resident of the State of New York, and defendant is a citizen and resident of the Western Division of the Northern Judicial District of Ohio, and that the amount involved herein, exclusive of interest and costs, exceeds the sum of Five Thousand Dollars ($5,000.00); that the bill of complaint and the several amendments and supplements thereto state a cause of action in equity, and that the State of Ohio is not a necessary party to this action; that the Ohio Electric Power Company, for the purpose of protecting, preserving and enforcing the lien of the mortgage and supplemental mortgage to plaintiff, is and was at the time of filing the bill of complaint herein the owner of all rights and franchises originally acquired in 1891 by The Incandescent Light and Power Company and in 1895 by The Northern Electric Company, respectively, by grants from the State of Ohio, and that the rights and franchises so acquired by said companies were to occupy and use the streets, alleys and public places of the City of Norwalk, Ohio, for the purposes of constructing, maintaining and operating poles, wires, and other necessary fixtures and electrical equipment therein for the distribution of electric current to the City of Norwalk, and the inhabitants thereof, for public, domestic and commercial light, heat and power purposes, in perpetuity as against any rights or power of the City of Norwalk, Ohio, with reference thereto but without prejudice to the right of said city to require such reasonable mode of use of said streets, alleys and public places as shall be agreed upon between the municipal authorities of said

city and the Ohio Electric Power Company and its successors, which will not incommode the public in the use thereof, or to make reasonable regulations as to such mode of use as to both the existing system and future extensions thereof, in the exercise of the police power (the question as to whether the Probate Court has power and jurisdiction to determine the mode of use in event of disagreement as to mode of use between the city and the holders of the franchises is not at this time involved in this case and is not decided), and said rights and franchises being subject otherwise to no limitations in time, except only by the exercise of such powers, if any, as may exist in the General Assembly of the State of Ohio to amend or repeal said franchise rights; but the question as to the existence of any such power in said General Assembly not being before the court is expressly not decided; that the plaintiff has a good and valid lien upon all of said franchise rights and upon all the physical properties of the Ohio Electric Power Company in the City of Norwalk, Ohio, which lien has existed since May 25, 1925; that said franchise rights and physical properties will be destroyed and rendered worthless, and that great and irreparable loss or damage will result to the plaintiff unless a permanent injunction is granted herein, as prayed for by plaintiff, and that the plaintiff has no adequate remedy at law.

It is, therefore, ordered, adjudged and decreed that as long as The Chase National Bank of the City of New York, plaintiff, or its successors in trust, or the holders of bonds heretofore issued secured by the mortgage and the supplemental mortgage thereto, described in the bill of complaint, or any person, firm or corporation claiming by, through or under them, or either of them, have as such any interest in the properties and franchises described in the bill of complaint and the several amendments and supplements thereto herein, and as long as any holders of mortgages or bonds executed and delivered in payment of or substitution for, or in refunding or extension of said mortgage and supplemental mortgage or of bonds heretofore issued thereunder shall have any interest in or lien upon said properties and franchises, the said defendant, City of Norwalk, Ohio, its attorneys, officers, officials, agents, employes and representatives, and all persons whomsoever to whom notice of this order shall come, be, and they are severally and collectively hereby enjoined and restrained from in any manner interfering with or interrupting the full exercise of any and all of said franchise rights of the Ohio Elec-

tric Power Company as hereinbefore found and the continued operation of the existing plant and electrical distribution system of the Ohio Electric Power Company in the streets, alleys or other public places of the City of Norwalk, Ohio, and from taking any steps, or doing any act to dismantle, wreck or remove any part of said existing system from the streets, alleys and public places of said city, and from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, decided May 21, 1928, which judgment was affirmed by the Supreme Court of Ohio, on June 12, 1929, and from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.

Nothing in this decree shall be interpreted as a finding or decision of the court upon the question of the right of the Ohio Electric Power Company to extend its lines as they exist at the date hereof, the court not finding it necessary to decide that question at this time. The question is therefore reserved and not decided.

It is further considered and ordered that the plaintiff, The Chase National Bank of the City of New York, have and recover of and from the defendant, City of Norwalk, Ohio, its costs herein.

Jurisdiction of this cause is retained by this court for the purpose of taking all action necessary to make this decree fully effective and for the purpose of passing upon the questions reserved and not hereby decided, and either party may apply for further relief at the foot of this decree should occasion arise therefor.

To all of the foregoing the defendant hereby excepts.

Dated this 27th day of June, 1931.

Geo. P. Hahn, Judge.

PETITION FOR APPEAL
(Filed July 25, 1931)

To the Honorable George P. Hahn, District Judge:

The above named defendant, City of Norwalk, Ohio, conceiving itself aggrieved by the decree entered in the above entitled cause on the 27th day of June, 1931, hereby appeals from said decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal may be allowed and a citation issued as provided by law, and that a transcript of the record, proceedings, papers, and exhibits necessary to said appeal may be duly authenticated and sent to the said United States Circuit Court of Appeals for the Sixth Judicial Circuit.

Rex F. Bracy,
G. Ray Craig,
W. A. Eversman,
Attorneys for the Defendant, the City of Norwalk, Ohio.

Dated July 24, 1931.

ASSIGNMENTS OF ERROR
(Filed July 25, 1931)

City of Norwalk, Ohio, defendant in the above entitled case, says that in the record of proceedings therein there is manifest error and that the District Court for the Northern District of Ohio, Western Division, erred in this, to-wit:

1. In finding and decreeing that the State of Ohio is not a necessary party to this action.

2. In not finding and decreeing that the State of Ohio is a necessary party to this action for the reason that this is an action to enjoin the carrying into effect of an order of ouster rendered by the Court of Appeals of

Huron County, Ohio, in an action in quo warranto brought by the State of Ohio on the relation of Edgar G. Martin, Prosecuting Attorney of Huron County, Ohio, against the Ohio Electric Power Company, plaintiff's mortgagor; and in not dismissing the bill of complaint for such defect in parties defendant.

3. In finding and decreeing that the Incandescent Light & Power Company and the Northern Electric Company by their incorporation under the law of the State of Ohio in 1891 and 1895 respectively, were granted by the State of Ohio the right to occupy and use the streets, alleys and public places of the defendant, City of Norwalk, Ohio, for the purposes of constructing, maintaining and operating poles, wires, and other necessary fixtures and electrical equipment therein for the distribution of electric current to the City of Norwalk, and the inhabitants thereof, for public, domestic and commercial light, heat and power purposes in perpetuity as against any right or power of the City of Norwalk with reference thereto (but without prejudice to the right of said city to require such reasonable mode of use of said streets, alleys and public places as shall be agreed upon between the municipal authorities of said city and The Ohio Electric Power Company and its successors, which will not incommode the public in the use thereof, or to make reasonable regulations as to such mode of use as to both the existing system and future extensions thereof, in the exercise of the police power, the question as to whether the Probate Court has power and jurisdiction as to the mode of use in event of disagreement as to mode of use between the city and the holders of the franchises being considered by the court not to be at this time involved in the case was not decided by the court).

4. In not finding and decreeing that the Incandescent Light & Power Company and the Northern Electric Company by their incorporation under the laws of the State of Ohio in 1891 and 1895, respectively, secured at most the capacity to secure the right to occupy and use the streets, alleys and public places of the City of Norwalk for the purpose of constructing, maintaining and operating poles, wires, and other electrical equipment therein, by entering into an agreement with said city with respect to the mode of use of said streets, alleys, and public places, or, if such agreement could not be secured, by securing an order of the Probate Court of Huron County, Ohio, with reference to such mode of use, and that the right arising from such agreement with the City of Norwalk, or from such order of the Probate Court of

Huron County, Ohio, would be limited in term to the term of such agreement or the term fixed by such order.

5. In finding and decreeing that the ordinance of the City of Norwalk of October 7, 1890, granting to the Norwalk Incandescent Light Company, a partnership, its successors and assigns, for the term of twenty years from the passage of said ordinance, "the right of way through, in, and upon the streets, sidewalks and alleys and the public grounds of said city for the uses and purposes of therein and thereupon erecting and maintaining and using all necessary poles and posts of wood, iron and other suitable material and the necessary wires to successfully operate and use a system of incandescent lighting in said city" upon certain conditions and provisions set forth in such ordinance, constituted an agreement as to the mode of use of the streets, alleys and public places of the City of Norwalk under Revised Statutes of Ohio of 1890, Section 3461, between the City of Norwalk and the Incandescent Light & Power Company and its successor, the Northern Electric Company, successors of the Norwalk Incandescent Light Company, and their successors and assigns, including The Ohio Electric Power Company, plaintiff's mortgagor.

6. In failing to find and decree that said ordinance of the City of Norwalk, dated October 7, 1890, upon acceptance by the Norwalk Incandescent Light Company became a valid contract between said City of Norwalk and said Norwalk Incandescent Light Company granting a right of way in the streets, alleys and public places of the City of Norwalk, limited in term to twenty (20) years, and upon the acceptance of an assignment thereof by the Incandescent Light & Power Company and its successor the Northern Electric Company and their successors, and operation thereunder by said companies, all of the terms and conditions of said ordinance including the limitation of the term thereof became binding upon the Incandescent Light & Power Company, the Northern Electric Company and their successors, including The Ohio Electric Power Company, plaintiff's mortgagor.

7. In failing to find and decree that The Incandescent Light & Power Company and The Northern Electric Company and their successors by accepting an assignment of the rights accruing from said ordinance of October 7, 1890, and the operation thereunder thereby waived all rights to occupy the streets, alleys and public places of the City of Norwalk with electrical distribution equipment which said corporations may have received by incorporation under the laws of the State of Ohio in 1891

and 1895, respectively, and that the plaintiff and its mortgagor, The Ohio Electric Power Company, are now estopped to claim any right to occupy the streets, alleys and public places of the City of Norwalk with electrical distribution equipment as a result of such acceptance of said ordinance by The Incandescent Light & Power Company and The Northern Electric Company and operation thereunder by said companies, alleged by the plaintiff to be its predecessors in title.

8. In failing to find and decree that the Act of April 21, 1896 (92 Ohio Laws 204, Revised Statutes 3471-A), revoked such capacity and right as the predecessors of The Ohio Electric Power Company may have had to enter upon the streets, alleys and public places of the City of Norwalk, with their electrical distribution equipment or to maintain the same therein beyond the term fixed by the said ordinance of the City of Norwalk of October 7, 1890, without the consent of said city.

9. In failing to find and decree that upon the expiration of the term fixed by the ordinance of October 7, 1890, the right to continue the operation of the electrical distribution system operated by the predecessors in title of The Ohio Electric Power Company under said ordinance other than by consent and grant by the City of Norwalk, Ohio, ceased and was non-existent and that no such consent or grant having been shown by the plaintiff, the plaintiff and its mortgagor, The Ohio Electric Power Company, are without continuing right to occupy the streets, alleys and public places of the defendant, City of Norwalk, with electrical distribution equipment.

10. In finding and decreeing that for the purpose of enforcing, protecting and preserving the liens of the mortgage and supplemental mortgage to the plaintiff herein, The Ohio Electric Power Company, plaintiff's mortgagor, has a continuing right to occupy the streets, alleys and public places of the City of Norwalk with its electrical distribution equipment in perpetuity as against any rights or power of the said City of Norwalk, Ohio, with reference thereto (but without prejudice to the right of said city to require such reasonable mode of use of said streets, alleys and public places as shall be agreed upon between the municipal authorities of said city and The Ohio Electric Power Company and its successors, which will not incommode the public in the use thereof, or to make reasonable regulations as to such mode of use as to both the existing system and future extensions thereof, in the exercise of the police power, the question as to whether the Probate Court has power and jurisdic-

tion as to the mode of use in event of disagreement as to mode of use between the city and the holders of the franchises being considered by the court not to be at this time involved in the case was not decided by the court, and in enjoining any interference by the City of Norwalk with the electrical distribution equipment of The Ohio Electric Power Company in the streets, alleys, and public places of the City of Norwalk upon the basis of such finding of continuing right.

11. In failing to find and decree that the plaintiff and its mortgagor, The Ohio Electric Power Company, are without right to occupy the streets, alleys and public places of the City of Norwalk with the electrical distribution equipment now maintained therein by The Ohio Electric Power Company, or any extensions thereof, and decree that the bill of complaint be therefore dismissed with costs to the plaintiff.

12. In finding and decreeing that the contract dated April 13, 1905, between the City of Norwalk and The Cleveland, Southwestern Traction Company, alleged by the plaintiff to be its predecessor in title, constituted merely an option in the City of Norwalk to require the removal of the electrical distribution equipment of the company upon the expiration of such contract, and that such option not having been exercised within a reasonable time has now expired.

13. In failing to find and decree that the resolution of the council of the City of Norwalk adopted March 23, 1926, requiring The Ohio Electric Power Company to remove from the streets, alleys, and public places of the City of Norwalk its electrical distribution equipment within thirty days thereafter, constituted execution of an option in the City of Norwalk to require the removal of such electrical distribution equipment if such contract of April 13, 1905, between the City of Norwalk, Ohio, and The Cleveland, Southwestern Traction Company constituted merely such option.

14. In finding and decreeing that the provisions of the contract dated April 13, 1905, between the City of Norwalk and The Cleveland, Southwestern Traction Company, alleged by the plaintiff to be its predecessor in title, requiring the company to remove its electrical distribution equipment from the streets, alleys and public places of said city upon the expiration of the ten-year term fixed in such contract were limited in their application to the street lighting equipment of said company, and in not finding and decreeing that such provisions constituted an affirmative obligation upon such com-

pany and its successors to remove all their electrical distribution equipment from the streets, alleys and public places of such city upon the expiration of said term of said contract.

15. In failing to find and decree that the contract dated April 13, 1905, between the defendant City of Norwalk, and the Cleveland, Southwestern Traction Company waived and terminated all rights which such company may then have had to continue to maintain and operate its electrical distribution equipment in the streets, alleys and public places of the City of Norwalk after the expiration of such contract and that plaintiff and its mortgagor, as successors of such company, are bound by such contract and are therefore without right to continue to maintain and operate an electrical distribution system in the streets, alleys and public places of the defendant city.

16. In failing to find and decree that the ordinance of the City of Norwalk, dated July 1, 1924, did not constitute a grant of right to the plaintiff or its mortgagor, The Ohio Electric Power Company, to continue the operation of their electrical distribution system in the City of Norwalk, Ohio, or an agreement between the City of Norwalk and The Ohio Electric Power Company as to the mode of use of the streets, alleys, and public places of the City of Norwalk under Revised Statutes of Ohio of 1890, Section 3461.

17. In failing to find and decree that the City of Norwalk is not estopped to claim and assert that The Ohio Electric Power Company, mortgagor to the plaintiff, is now occupying the streets, alleys, and public places of the City of Norwalk, Ohio, with its electrical distribution equipment without right, grant, or franchise of any kind whatsoever.

18. In failing to find and decree that the Act of May 12, 1886, 62 Ohio Laws 72, was in full force and effect in the years 1890 and 1895, respectively, and that The Incandescent Light & Power Company and The Northern Electric Company, incorporated respectively in such years, could, therefore, secure no rights to occupy the streets, alleys and public places of the City of Norwalk, Ohio, without the consent of said city.

19. In finding and decreeing that the present bondholders of The Ohio Electric Power Company represented by the plaintiff trustee herein were and are entitled to rely and insist upon the interpretation of the statutes and law of Ohio with regard to the nature of and creation of rights to occupy the streets, alleys and

public places of municipalities of Ohio with electrical distribution equipment, between the years 1887 and 1896 as contained in opinions and decisions of the Supreme Court of Ohio prior to the date of the mortgage and supplemental mortgage to plaintiff's predecessor trustee referred to in the bill of complaint and the amendments and supplements thereto, and that the court was required to ignore the interpretations and findings as to such statutes and law, contained in opinions and decisions of the Supreme Court of Ohio after the dates of such mortgage and supplemental mortgage.

20. In finding and decreeing that the case of *Hardin-Wyandot Company vs. Village of Upper Sandusky, 93 Ohio State 426, affirmed 251 U. S. 177,* constitutes a clear and authoritative interpretation of the statutes and laws of the State of Ohio relating to the creation and nature of rights to occupy the streets of municipal corporations of the State of Ohio with electrical distribution equipment between the years 1887 and 1896, and that under such opinion and decision the court was required to find and decree that the plaintiff through its mortgagor, The Ohio Electric Power Company, has a continuing right to occupy the streets, alleys, and public places of the City of Norwalk with the existing electrical distribution equipment of The Ohio Electric Power Company.

21. In failing to find and decree that the District Court is bound by the interpretation of the statutes of Ohio relating to the creation of and the nature of the right to construct and maintain electrical distribution equipment in the streets, alleys, and public places of municipal corporations of the State of Ohio between the years 1887 and 1896 contained in the opinions and decisions of the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio in the case of State of Ohio ex rel. Martin vs. The Ohio Electric Power Company as the latest and only clear and authoritative decision upon the subject by the courts of the State of Ohio, and in failing to find and decree that the bill of complaint be dismissed for the reason that under such decision the plaintiff and its mortgagor, The Ohio Electric Power Company, have no continuing right to occupy the streets, alleys and public places of the City of Norwalk, Ohio, with their electrical distribution equipment.

22. In finding and decreeing that the acts and threatened acts of the defendant, City of Norwalk, create a situation entitling the plaintiff to an injunction to prevent irreparable injury and in granting a permanent injunction for such reason.

23. In failing to find and decree that there was no proof of intention upon the part of the defendant, City of Norwalk, to interfere with or destroy the property and rights of the plaintiff or its mortgagor, The Ohio Electric Power Company, by force and violence or by unlawful methods and that the bill of complaint be dismissed for want of equitable jurisdiction.

24. In enjoining the Court of Appeals of Huron County, Ohio, and its officers and agents, from carrying into effect the judgment of ouster entered by such court in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, Prosecuting Attorney of Huron County, Ohio, against The Ohio Electric Power Company in view of the prohibition against such injunction contained in *Title 28, U. S. C. A., Section 379* (*Judicial Code, Sec. 265*).

25. In finding and decreeing that the plaintiff and its mortgagor, The Ohio Electric Power Company, are the successors to any and all rights and capacities to secure rights to occupy the streets, alleys and public places of municipalities of the State of Ohio which were held by The Incandescent Light & Power Company or The Northern Electric Company and their alleged successors in title, The Norwalk Gas & Electric Company, The Cleveland, Southwestern Traction Company, The Cleveland, Southwestern & Columbus Railway Company, The Cleveland, Southwestern Railway & Light Company, and Victor Emmanuel.

26. In finding and decreeing that jurisdiction of the cause was retained by the District Court for the purpose of passing upon questions reserved and not decided by the court, such questions being questions which the court expressly found were not presented to it for decision by the evidence at the hearing of this cause.

27. In finding and decreeing that the prayers of plaintiff's bill of complaint and the amendments and supplements thereto should be granted insofar as an injunction against interference with the existing electrical distribution equipment of The Ohio Electric Power Company was requested.

28. In not finding and decreeing that plaintiff's bill of complaint and the amendments and supplements thereto should be dismissed with a decree that defendant recover of the plaintiff its costs herein.

Wherefore, defendant prays that the decree entered by the District Court herein on the 27th day of June, 1931, may be reversed and that the District Court be ordered to enter a decree dismissing the bill of complaint

and the amendments and supplements thereto, and for such other and further relief as to the court may seem just and proper.

Rex F. Bracy,
G. Ray Craig,
W. A. Eversman,
Attorneys for the Defendant-Appellant.

Dated July 24, 1931.

ORDER ALLOWING APPEAL

(Filed July 25, 1931)

On petition of the defendant in the above entitled cause it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered herein be, and the same is, hereby allowed, and that a transcript of the record, proceedings, and papers in this case necessary to said appeal shall be duly authenticated and sent to the United States Circuit Court of Appeals.

It is further ordered that the bond on this appeal be and is fixed at the sum of Five Hundred Dollars ($500.00) to secure the costs on appeal.

Geo. P. Hahn,
District Judge.
Paul Jones,
District Judge.

At Youngstown, Ohio, July 25th, 1931.

Dated July 25th, 1931.

CITATION
(Filed Aug. 7, 1931)

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To The Chase National Bank of the City of New York, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit on the 22nd day of August next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein the City of Norwalk is defendant-appellant and The Chase National Bank of the City of New York, having been substituted as plaintiff for the Equitable Trust Company of New York, is plaintiff-appellee, to show cause, if any there be, why the decree rendered against the said City of Norwalk, Ohio, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, this 25th day of July in the year of our Lord one thousand nine hundred and thirty-one and of the Independence of the United States of America the one hundred and fifty-seven.

Geo. P. Hahn,
Judge of the District Court.
Paul Jones,
Judge of the District Court.

At Youngstown, Ohio, July 25th, 1931.

Service of the above citation is hereby acknowledged and appearance of plaintiff-appellee is hereby entered.

Tracy, Chapman & Welles,
Earl F. Boxell,
Of Counsel for The Chase National Bank of the City of New York, Plantiff-Appellee.

August 6, 1931.

ORDER EXTENDING TIME

(Filed Aug. 11, 1931)

Upon application of the defendant-appellant the time for filing the narrative statement of testimony in the above case is hereby extended to September 4, 1931, and the time for filing the printed transcript of record in the United States Circuit Court of Appeals for the Sixth Circuit is hereby extended to October 4, 1931.

Geo. P. Hahn,
United States District Judge.

Dated August 6th, 1931.

Approved:

Earl F. Boxell,
Of Counsel for The Chase National Bank of the City of New York, Plaintiff-Appellee.

BOND ON APPEAL

(Filed Aug. 24, 1931)

Know All Men By These Presents: That we, City of Norwalk, Ohio, a municipal corporation of the State of Ohio, as principal, and The Fidelity and Casualty Company of New York, N. Y., as surety, are held and firmly bound unto the plaintiff in the above entitled cause in the sum of Five Hundred and no/100 Dollars ($500.00) to be paid to the said plaintiff, its successors and assigns, to the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Witness our signatures and seals affixed hereto by our duly authorized officers this 20th day of August, 1931.

Whereas, on the 27th day of June, 1931, a decree was entered in the above entitled cause and the defendant, City of Norwalk, Ohio, has obtaind an order allow-

ing an appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit.

Now, the condition of the above obligation is such that if the defendant, City of Norwalk, Ohio, shall prosecute its said appeal to effect and shall answer all costs that may be awarded against it, if it shall fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and effect.

City of Norwalk, Ohio,
By Cort M. Schock, Mayor. (Seal)
F. G. Warner, Auditor.
The Fidelity and Casualty Co.
of New York,
By H. S. Bowen, Attorney.

Approved:
Geo. P. Hahn,
District Judge.

ORDER EXTENDING TIME

(Filed Sept. 5, 1931)

It is hereby ordered that the time within which the defendant-appellant shall lodge its narrative form of testimony with the clerk is extended to and including September 30, 1931, and that the time for the defendant-appellant to complete its record and file the same and for the making of the clerk's return to the citation on defendant-appellant's appeal in this case in the United States Circuit Court of Appeals pursuant to the appeal sued out is extended to and including October 30, 1931.

Geo. P. Hahn,
Toledo, Ohio, 1931. District Judge.

Approved:

.....

Counsel for the Plaintiff-Appellee, The Chase National Bank of the City of New York.

ORDER EXTENDING TIME

(Filed October 15, 1931)

It is hereby ordered that the time within which the plaintiff-appellee may file any exceptions, objections or amendments to the narrative form of testimony lodged with the clerk on September 30, 1931, by defendant-appellant, and for settling and filing the narrative form of testimony be, and the same hereby is enlarged to and including November 10, 1931.

Geo. P. Hahn,
District Judge.

Dated October 15, 1931.

Approved:

W. A. Eversman,
Counsel for the Defendant-Appellant,
City of Norwalk, Ohio.

ORDER EXTENDING TIME

(Filed October 24, 1931)

It is hereby ordered that the time within which the plaintiff shall file its objection to the praecipe for transcript of record on appeal filed this day by the defendant and its counter praecipe is hereby extended to and including November 10, 1931.

It is further ordered that the time for hearing upon the matter of the approval of the statement of evidence is hereby set for November 13, 1931, at 9:00 o'clock A. M., or as soon thereafter as the business of the court permits.

It is further ordered that the time for the defendant to complete its record and file the same and for the making of the clerk's return to the citation on defendant's appeal in this cause in the United States Circuit Court of Appeals, pursuant to the appeal sued out by the defendant is extended to and including November 30, 1931.

Geo. P. Hahn,
District Judge, Toledo, Ohio.

October 24, 1931.

Approved:

Earl F. Boxell,
Of Counsel for The Chase National Bank
of the City of New York.

W. A. Eversman,
Counsel for the City of Norwalk.

ORDER EXTENDING TIME

(Filed November 16, 1931)

It is hereby ordered that the time within which the plaintiff-appellee may file any exceptions, objections or amendments to the narrative form of testimony lodged with the clerk on September 30, 1931, by defendant-appellant, be, and the same hereby is, enlarged to and including November 21, 1931, and the time for hearing upon the matter of the approval of the narrative form of testimony is continued to nine o'clock A. M., November 23, 1931, or as soon thereafter as the court may hear the same.

It is further ordered that the time within which the plaintiff shall file any objections to the praecipe for transcript of the record on appeal filed by the defendant-appellant, and for the filing by plaintiff-appellee of its praecipe for additional portions of the record to be incorporated into the transcript be, and the same hereby is, enlarged to and including November 21, 1931.

It is further ordered that the time for the defendant to complete its record and file the same and for the making of a clerk's return to the citation on defendant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeals sued out by the defendant, is hereby extended to and including December 15, 1931.

Geo. P. Hahn,
District June.

Dated November 16, 1931.

Approved:

Earl F. Boxell,
Of Counsel for Plaintiff-Appellee.

AFFIDAVIT FOR PLAINTIFF UPON TAXATION OF COSTS

(Filed November 21, 1931)

State of Ohio, Lucas County, ss.

Earl F. Boxell, being first duly sworn, says that he is one of the attorneys for plaintiff in the above entitled case and is a member of the firm of Tracy, Chapman & Welles, solicitors for plaintiff. Affiant says that the following disbursements have been made by and in behalf of plaintiff, and he claims that the same should be assessed as part of the costs herein:

Payment to Lawrence Lennon for reporting service and transcript of proceedings at hearing on January 15, 1930, as per statement attached, marked Exhibit A	$ 22.50
Payment to Lawrence Lennon for one-half cost of reporting service and one-half cost of original transcript of proceedings on hearing commenced November 12, 1930, as per statement attached, marked Exhibit B	125.00
Payment to Lawrence Lennon for one-half of reporting service and one-half of the cost of original transcript of proceedings at hearing on December 8, 1930, as per statement attached, marked Exhibit C	20.00
Payment to Lawrence Lennon for one-half of reporting service and one-half expense of original transcript of proceedings on hearing commencing December 22, 1930, as per statement attached, marked Exhibit D	66.00
Payment to Clarence J. Taylor for witness fees and mileage as taxed by the clerk of this court, as per slip marked Exhibit E, showing receipt by said witness	9.90
Payment to R. L. Christian for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit F, showing receipt by said witness	13.30
Payment to John A. Nester for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit G, showing receipt by said witness	13.30
Payment to A. A. Ruffing for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit H, showing receipt by said witness	7.80

Payment to L. B. Fauver for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit I, showing receipt by said witness..... 12.80

Payment to L. J. Wolf for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit J, showing receipt by said witness 13.30

Payment to D. E. Turkle for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit K, showing receipt by said witness..... 14.00

Payment to William Purcell for taking and transcribing deposition of Burton P. Foster, as per statement attached hereto, marked Exhibit L 24.00

$341.90

Earl F. Boxell.

Sworn to before me and subscribed in my presence this 21st day of November, 1931.

Pauline Odom,
(Seal) Notary Public, Lucas County, Ohio.
My commission expires October 11, 1932.

Service of a copy of the foregoing acknowledged this 21st day of November, 1931.

W. A. Eversman,
Per H. C. L. Solicitors for Defendant.

EXHIBIT A

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, January 20, 1930.

Messrs. Tracy, Chapman & Welles,
Ohio Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, No. 1040.

Proceedings of January 15, 1930:

Reporting service .....$ 7.50
Transcript of proceedings; 30 pp. @ 50c..... 15.00

$22.50

Paid, February 10, 1930. Check No.....

EXHIBIT B

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, December 6, 1930.

Messrs. Tracy, Chapman & Welles,
Ohio Bank Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, 1040:

Proceedings upon hearing for a preliminary injunction, commencing November 12, 1930:

One-half cost of per diem reporting service, 4 days @ $15.00—$60.00	$ 30.00
One-half cost of original transcript of proceedings filed with court; 380 pps. @ 50c—$190.00	95.00
Two complete copies of transcript furnished counsel; 380 pps. @ 25c—$95.00 each	190.00
	$315.00

Payment received.

Lawrence Lennon.

EXHIBIT C

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, December 13, 1930.

Messrs. Tracy, Chapman & Welles,
Ohio Bank Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, 1040.

Proceedings upon hearing for a preliminary injunction, December 8, 1930:

One-half expense of reporting service, $10.00	$ 5.00
One-half cost of original transcript of proceedings filed with court; 60 pps. @ 50c—$30.00	15.00
Two complete copies of transcript; 60 pps. @ 25c—$15.00 each, furnished counsel	30.00
	$50.00

Received payment.

Lawrence Lennon.

EXHIBIT D

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, January 14, 1931.

Messrs. Tracy, Chapman & Welles,
Ohio Bank Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, 1040: Arguments of Counsel, December 22, 1930, upon hearing of motion for a preliminary injunction:

One-half expense of reporting service, two days—$30.00	$ 15.00
One-half expense original transcript filed with court; 170 pps. @ 60c—$102.00	51.00
Expense of two complete copies furnished counsel; 170 pps. @ 30c—$51.00 each	102.00
	$168.00

Received payment.

Lawrence Lennon.

EXHIBIT E

United States District Court
Northern District of Ohio
No. 1040 Equity

Chase National Bank of N. Y.
vs.
The City of Norwalk.

It Is Hereby Certified, That Clarence J. Taylor, Lima, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$2.00
Mileage	7.90
Total	$9.90

F. J. Denzler, Clerk,
By K. V. Wilson, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec. 983.)

Indorsed: Received payment of the within stated witness fee.

Clarence G. Taylor.

EXHIBIT F

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That R. L. Christian, Cleveland, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	11.30
Total	$13.30

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

R. L. Christian.

EXHIBIT G

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That John A. Nester, Lakewood, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	11.30
Total	$13.30

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

J. A. Nester.

EXHIBIT H

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.

vs.

The City of Norwalk, Ohio.

It Is Hereby Certified, That A. A. Ruffing, Norwalk, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	5.80
Total	$ 7.80

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

A. A. Ruffing.

EXHIBIT I

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That L. B. Fauver, Elyria, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 4.00
Mileage	8.80
Total	$12.80

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

L. B. Fauver.

EXHIBIT J

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That L. J. Wolf, Cleveland, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	11.30
Total	$13.30

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

L. J. Wolf.

EXHIBIT K

United States District Court
Northern District of Ohio
No. 1040 Equity

Chase National Bank of City of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That D. E. Turkle, Bad Axe, Michigan, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 4.00
Mileage	10.00
Total	$14.00

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

D. E. Turkle.

EXHIBIT L

WILLIAM PURCELL
General Shorthand Reporter
Suite 529-534 Nasby Bldg.
Phone, MAin 0818

In Account with
Tracy, Chapman & Welles,
1002 Ohio Bldg.

Toledo, Ohio, July 3, 1930.

Taking and transcribing deposition of Burton P. Foster in the case of The Equitable Trust Company of New York vs. The City of Norwalk, Ohio.

Original, 96 folios @ 25c	$24.00
Two Carbons, 192 folios @ 10c	19.20
	$43.20

Paid July 10, 1930. Check No.....

ORDER EXTENDING TIME

(Filed Dec. 15, 1931)

It is hereby ordered that the time for the defendant to complete its record and file the same and for the making of the clerk's return to the citation on defendant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeal sued by the defendant, is hereby extended to and including January 11, 1932.

Geo. P. Hahn,
District Judge.

Dated December 14, 1931.

Approved:

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee.

STIPULATION RE CERTIFICATION OF THE RECORD

(Filed Dec. 31, 1931)

In accordance with Section 7 of Rule 44 of the General Rules of this court, it is stipulated and agreed that the record as presented to the clerk by the printer upon comparison by counsel may be certified by the clerk, as required by the rules of this court and the rules of the Circuit Court of Appeals, as a true, full, and complete copy of the original pleadings, papers, and orders used in the trial of this suit, as set forth in the praecipe for transcript and narrative form of testimony without further comparison by the clerk.

Dated December 31, 1931.

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee, The Chase National Bank of the City of New York:

W. A. Eversman,
Of Counsel for the Defendant-Appellant, The City of Norwalk.

ORDER

(Filed Dec. 31, 1931)

It is hereby ordered that in the preparation of the printed transcript of record on appeal in this cause the defendant shall omit therefrom those parts of Plaintiff's Exhibits 17, 27, 27½, and 28 which are marked "omit."

It is further ordered that Plaintiff's Exhibits 48, 49, 50, 72, 73, 74, and 75, and Defendant's Exhibits R, S, and C shall not be printed in said transcript of record on appeal.

It is further ordered that Plaintiff's Exhibits 17, 27, 27½, 28, 48, 49, 50, 72, 73, 74, and 75, and Defendant's Exhibits R, S, and C shall be sent by the clerk of this court to the Circuit Court of Appeals as physical exhibits to accompany the printed transcript of record on appeal, pursuant to Section 6 of Rule 15 of the Rules of the Circuit Court of Appeals of this Circuit.

It is further ordered that all other exhibits admitted at the hearing in this case shall be printed in the transcript of record on appeal and that Exhibit No. 6 attached to the deposition of Charles Suhr shall be given the numbering "Defendant's Exhibit U" in said printed transcript of record.

Geo. P. Hahn, Judge.

Dated December 31, 1931.

Approved:

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee, The Chase National Bank of the City of New York.

W. A. Eversman,
Of Counsel for the Defendant-Appellant, The City of Norwalk.

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

(Filed Oct. 24, 1931)

To the Clerk:

Please prepare transcript of record in the above entitled suit to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to an appeal allowed in the said suit, and include in said transcript of record the following papers and orders:

1. Title page.
2. Caption.
3. Plaintiff's bill of complaint.
4. Amendment and supplement to plaintiff's bill of complaint.
5. Affidavit of Earl F. Boxell.
6. Temporary restraining order.
7. Bond.
8. Order continuing temporary restraining order for ten days, filed January 18, 1930.
9. Order continuing temporary restraining order until final hearing.

9a. Motion to substitute Chase National Bank of the City of New York as party plaintiff.

10. Order allowing The Chase National Bank of the City of New York to be substituted as party plaintiff.
11. Second amendment and supplement to plaintiff's bill of complaint.
12. Defendant's answer.
13. Third amendment and supplement to plaintiff's bill of complaint.
14. Defendant's answer to third amendment and supplement to plaintiff's bill of complaint.
15. Narrative statement of evidence and order approving same.

15a. Order in re exhibits.

16. Memorandum opinion of the Honorable George P. Hahn, judge.
17. Final decree, entered and filed June 27, 1931.
18. Defendant's petition for appeal, entered and filed July 25, 1931.
19. Defendant's assignment of errors, entered and filed July 25, 1931.
20. Order allowing appeal and fixing amount of bond, entered and filed July 25, 1931.
21. Copy of citation and acknowledgment of service thereof by the plaintiff, The Chase National Bank of the City of New York.

22. Order extending time for the lodging of the narrative statement of testimony to September 4, 1931, and for filing the transcript of record in the Circuit Court of Appeals to October 4, 1931.

23. Bond on appeal filed by the defendant and approved by Honorable George P. Hahn, judge, August 24, 1931.

24. Order extending time for the lodging of the narrative statement of testimony to September 30, 1931, and for the filing of the transcript of record in the Circuit Court of Appeals and for making return on citation to October 30, 1931.

25. Orders, if any, entered subsequently hereto, extending time for filing the transcript in the Circuit Court of Appeals and making return on the citation to the Circuit Court of Appeals, and extending time for filing objections and amendments to narrative and for filing plaintiff's counter praecipe.

26. This praecipe for transcript of record on appeal.

27. Stipulation between attorneys for the parties relative to certification of the record and all other stipulations between attorneys for the parties hereafter filed relative to the record on appeal.

29. Plaintiff's affidavit upon taxation of costs.

30. Defendant's affidavit upon taxation of costs.

28. Clerk's certificate.

Please deliver papers to the H. J. Chittenden Company, Toledo, Ohio, for printing.

G. Ray Craig,
E. G. Martin,
W. A. Eversman,
Attorneys for City of Norwalk, Ohio,
Defendant-Appellant.

NOTICE OF PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

(Filed Oct. 24, 1931)

To Messrs. Tracy, Chapman & Welles, George D. Welles, and Earl F. Boxell, Attorneys for Plaintiff, The Chase National Bank of the City of New York:

You are hereby notified that the defendant in the above entitled suit will file forthwith the foregoing praecipe indicating the portions of the record it desires to have incorporated into the transcript of record on appeal.

G. Ray Craig,
E. G. Martin,
W. A. Eversman,
Attorneys for the Defendant, City of Norwalk.

October 24, 1931.

Service and receipt of copies of the foregoing notice and praecipe are acknowledged on behalf of the plaintiff, The Chase National Bank of the City of New York, this 24th day of October, 1931.

Tracy, Chapman & Welles,
Of Attorneys for Said Plaintiff.

ORDER EXTENDING TIME

(Filed Jan. 4, 1932)

It is hereby ordered that the time for the defendant to complete its record and file the same and for the making of the clerk's return to the citation on defendant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeal sued by the defendant, is hereby extended to and including February 11, 1932.

Geo. P. Hahn,
District Judge.

Dated January 4, 1932.

Approved:

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

No.....

THE CITY OF NORWALK, OHIO,
Defendant-Appellant.

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,
Plaintiff-Appellee.

Appeal from the District Court of the United States, Northern District of Ohio, Western Division

---

TRANSCRIPT OF RECORD

REX F. BRACEY, *Norwalk, Ohio,*
G. RAY CRAIG, *Norwalk, Ohio,*
E. G. MARTIN, *Norwalk, Ohio,*
W. A. EVERSMAN, *Toledo, Ohio,*
WILLIAMS, EVERSMAN & MORGAN,
Toledo, Ohio,
Attorneys for Appellant

MILBANK, TWEED, HOPE & WEBB, *New York City,*
TRACY, CHAPMAN & WELLES, *Toledo, Ohio,*
Solicitors for Appellee

GEORGE D. WELLES, *Toledo, Ohio,*
EARL F. BOXELL, *Toledo, Ohio,*
Of Counsel for Appellee.

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DEFENDANT'S AFFIDAVIT UPON TAXATION OF COSTS

(Filed January 30, 1932)

State of Ohio, County of Lucas, ss.

Hugh C. Laughlin, being first duly sworn, says that he is one of the attorneys for the defendant in the above entitled cause and is associated with the firm of Williams, Eversman & Morgan, solicitors for the defendant. Affiant further says that the following disbursements have been made by and in behalf of the defendant and claims that the same should be assessed as part of the costs herein:

Payment to Lawrence Lennon for reporting service and one-half cost of original transcript of proceedings on hearing commencing November 12, 1930, as per statement attached marked "Exhibit A"	$125.00
Payment to Lawrence Lennon of one-half of cost of reporting service and one-half of cost of original transcript of proceedings on hearing December 8, 1930, as per statement attached marked "Exhibit B"	20.00
Payment to Lawrence Lennon for one-half of reporting service and one-half of cost of original transcript of proceedings on hearing commencing December 22, 1930, as per statement attached marked "Exhibit C"	66.00
Payment to Henry Young for services as Notary Public in the taking of the deposition of Charles A. Suhr, as per statement attached to said deposition on file with the court, copy of which is attached hereto marked "Exhibit D"	25.50
Payment to Francis Connolly for reporting service and transcribing deposition of Charles A. Suhr, as per statement attached to said deposition on file with the court, copy of which is attached hereto marked "Exhibit D"	33.45
Payment of witness fee to Charles Suhr on taking of his deposition, as per statement attached to the deposition, copy of which is attached hereto marked "Exhibit D"	2.00
Total	$271.95

Hugh C. Laughlin.

Sworn to before me and subscribed in my presence this 30th day of January, 1932.

Anita Clark,
(Seal) Notary Public in and for
Said County and State.

Service of a copy of the foregoing acknowledged this 30th day of January, 1932.

Earl F. Boxell, by L. H.,
Of Counsel for the Plaintiff.

EXHIBIT A

LAWRENCE LENNON
Reporter U. S. District Court
Toledo, Ohio

(Copy) December 6, 1930.

Messrs. Geddes, Schnettau, Williams,
Eversman & Morgan
Board of Trade Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York, vs. City of Norwalk, Ohio; Equity 1040:

Proceedings upon hearing for a preliminary injunction, commencing November 12, 1930:

One-half cost of per diem reporting service, four days @ $15.00—$60.00	$ 30.00
One-half cost of original transcript of proceedings filed with court; 380 pps. @ 50c—$190.00	95.00
One complete copy of transcript furnished counsel; 380 pps. @ 25c	95.00
	$220.00

Payment received,
Lawrence Lennon.

EXHIBIT B

LAWRENCE LENNON
Reporter U. S. District Court
Toledo, Ohio

(Copy) December 13, 1931.

Messrs. Geddes, Schmettau, Williams,
Eversman & Morgan,
Board of Trade Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity 1040:

Proceedings upon hearing for a preliminary injunction, December 8, 1930:

One-half expense of reporting service, $10.00	$ 5.00
One-half cost of original transcript of proceedings filed with court; 60 pps. @ 50c—$30.00	15.00
One complete copy of transcript; 60 pps. @ 25c furnished counsel	15.00
	$35.00

Payment received,
Lawrence Lennon.

EXHIBIT C

LAWRENCE LENNON
Reporter U. S. District Court
Toledo, Ohio

(Copy) January 14, 1931.

Messrs. Geddes, Schmettau, Williams,
Eversman & Morgan,
Board of Trade Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity 1040:

Arguments of counsel, December 22, 1930, upon hearing of motion for a preliminary injunction:

One-half expense of reporting service, two days—$30.00	$ 15.00
One-half expense original transcript filed with court; 170 pps. @ 60c—$102.00	51.00
Expense of one complete copy furnished counsel; 170 pps. @ 30c	51.00
	$117.00

Payment received,
Lawrence Lennon.

EXHIBIT D

In the District Court of the United States for the Northrn District of Ohio, Western Division.

No. 1040 in Equity.

The Equitable Trúst Co., et al.,

Plaintiff,

vs.

City of Norwalk, Ohio,

Defendant.

COST BILL ATTACHED TO DEPOSITION OF CHARLES SUHR

COST BILL
(Gen. Code 11545)

Writing Depositions and Certificates at 10 Cents per 100 words		$25.00
Issuing Subpoenas, 50 cents each		$
Swearing witnesses, 4 cents each		$ .04
Clerk's Certificate		$
Postage		$ .46
		$25.50

Constable's Fees

Service of Subpoena	$
Mileage of Subpoena	$
Frances Conley, Stenographer	$33.45
	$58.95

Witness Fees

Seventy-five cents per day, and five cents per mile, traveling fees.

Charles Suhr	$ 2.00
	$ 2.00
Total cost of taking Depositions	$60.95

Received of City of Norwalk, defendant, the sum of $25.50 in full of my fees, as above specified, and also $... in full of Constable's fees. The witnesses' fees were paid by City of Norwalk, in the sum of $2.00, bill of Frances Conley, Stenographer, was also paid by the deft. City of Norwalk, $33.45.

Henry Young,
Notary Public.

(Seal)

PLAINTIFF'S EXHIBIT No. 1

In the District Court of the United States for the Northern District of Ohio, Western Division

No. 1040 In Equity

The Equitable Trust Company of New York,
Plaintiff,

vs.

City of Norwalk, Ohio,
Defendant.

STIPULATION

It is stipulated and agreed by and between counsel for plaintiff and defendant that this stipulation may be offered in evidence upon the trial of this case as proof of the facts stated herein without objection other than to the relevancy and materiality of such facts.

It is stipulated and agreed that on September 2, 1924, The Seaboard National Bank of the City of New York was, and for a long time prior thereto had been a banking corporation duly organized and existing under the laws of the United States, with its principal place of business at New York, New York, and was fully authorized to take and hold in trust mortgages of property owned in Ohio by Ohio corporations and to execute trusts imposed by such mortgages for the benefit of the holders of bonds issued thereunder; that on or about ....., 1929, said The Seaboard National Bank of the City of New York was merged with The Equitable Trust Company of New York, said merger being accomplished by proper action of said corporations' respective Boards of Directors and stockholders; that said The Equitable Trust Company of New York was at the time of said merger, and for some time prior thereto, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at New York, New York, for the purpose of engaging in a general banking and trust business, and was fully authorized to act as mortgagee and trustee under corporate mortgages with like powers, as above stated as belonging to said The Seaboard National Bank of the City of New York; that said The Equitable Trust Company was at all times during its existence a citizen and resident of the State of New

York; that by virtue of said merger The Equitable Trust Company of New York succeeded to and acquired all of the properties and rights formerly held by said The Seaboard National Bank of the City of New York, and particularly including all such properties, security and rights as were formerly acquired and up to that time held by said The Seaboard National Bank of the City of New York under and by virtue of a certain mortgage and deed of trust, dated July 1, 1924, and a supplemental mortgage to said mortgage and deed of trust, dated May 25, 1925, executed and delivered by the Ohio Electric Power Company to said The Seaboard National Bank of the City of New York, as Trustee, to secure first mortgage gold bonds of the Ohio Electric Power Company to be issued under said mortgage and deed of trust and supplemental mortgage thereto; which mortgage and deed of trust and supplemental mortgage thereto are recorded in the mortgage records of Huron County, Ohio, in Volume 95, pages 41 to 74, both inclusive, and Volume 95, pages 75 to 78, both inclusive, respectively, that on or about May 31, 1930, and for a long time prior thereto, The Chase National Bank of the City of New York was a corporation duly organized and existing under and by virtue of the laws of the United States, with its principal place of business at New York, New York, for the purpose of engaging in a general banking and trust business, possessing all of the powers in relation to corporate mortgages above described as belonging to The Seaboard National Bank of the City of New York, and The Equitable Trust Company of New York; that on or about May 31, 1930, said The Equitable Trust Company of New York was merged with The Chase National Bank of the City of New York, said merger being accomplished by proper action of said corporations' respective Boards of Directors and stockholders, and thereby The Chase National Bank of the City of New York succeeded to and acquired and now has all of the properties and rights formerly held by said The Equitable Trust Company of New York, and particularly including all such properties, security and rights up to that time held by said The Equitable Trust Company as successor to The Seaboard National Bank of the City of New York under said mortgage and deed of trust and supplemental mortgage thereto above described; and that The Chase National Bank is fully empowered and authorized by law to act as Trustee under said instruments.

It is further stipulated and agreed that from some time in the latter part of the year 1890 until about the

first of September, 1895, a generating plant was in existence in the City of Norwalk and was owned and in use by predecessors of the Ohio Electric Power Company during said period in generating electric current for distribution in said city; that from about September 1, 1895, until the present time, there has been in existence in the City of Norwalk another generating plant, which was constructed in the year 1895 by the Northern Electric Company and owned by said company, and which took the place in service of the plant above referred to; that said plant built in 1895 was in substantially continuous use in the generation of power for distribution in the City of Norwalk for about ten (10) years from September 1, 1895, and since that time to the present time has been in occasional use from time to time for standby and auxiliary service, the efficiency and capacity of which plant the City does not admit, but evidence on said subject may be introduced by either party hereto; that during said entire period from the year 1890 to the present time, there has been in the streets and public places of the City of Norwalk an electrical distribution system connected at all times with either one or the other of the generating plants above referred to, and that said electrical distribution system since the year 1890 has been continuously operated by the Ohio Electric Power Company and its predecessors in possession in the City of Norwalk in serving private consumers, and during the period from 1890 to 1915 was also in service for street lighting and the lighting of public offices.

It is further stipulated and agreed that in each and every one of the years beginning with 1911 to the present time, the Ohio Electric Power Company and its respective predecessors in possession since 1910 have duly reported, among other properties situated in the State of Ohio, their properties situated in the City of Norwalk to the proper taxing authorities of the State of Ohio for the assessment of taxes; that in each of said years, taxes have been assessed against said properties by the proper authorities of the State of Ohio; that the taxes so levied and assessed against the Ohio Electric Power Company and its predecessors in possession in respect of properties in the City of Norwalk, Ohio, have been paid by said Company and said predecessors to the proper authorities; that during the years 1911 to 1929, both inclusive, the tax rate per thousand dollars of valuation of real and personal property (not including any value for franchises) in the City of Norwalk, Ohio, as fixed by the proper taxing authorities of Huron County, Ohio, and

the valuation of the said real and personal property of said Company and its predecessors in said city, as fixed by the proper taxing authorities of the State of Ohio, are shown by the following table:

Year	Tax Rate per Thousand of City of Norwalk	Valuation
1911	4.112	300.00
1912	5.70	6,730.00
1913	5.60	6,830.00
1914	5.786	12,330.00
1915	5.70	12,730.00
1916	5.32	12,730.00
1917	5.32	12,730.00
1918	4.84	12,730.00
1919	5.10	12,730.00
1920	5.44	12,730.00
1921	8.17	9,050.00
1922	6.90	9,050.00
1923	7.10	4,300.00
1924	6.70	4,300.00
1925	6.20	13,800.00
1926	5.85	12,370.00
1927	5.90	34,440.00
1928	5.55	27,500.00
1929	5.55	33,900.00

It is further stipulated and agreed that in each and every one of the years above named, the City of Norwalk, Ohio, received through the County Treasurer of Huron County, Ohio, its share, based on the tax rates above stated, of all taxes collected upon all real and personal property located in the City of Norwalk.

It is further stipulated and agreed that the population of the City of Norwalk, Ohio, as shown by the United States Census, is and has been as follows:

Year	Number
1890	7195
1900	7074
1910	7858
1920	7379
1930	7775

Geo. D. Welles,
Counsel for Plaintiff.

W. A. Eversman,
Counsel for Defendant.

PLAINTIFF'S EXHIBIT No. 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 1040 In Equity

The Equitable Trust Company of New York,
Plaintiff,

vs.

City of Norwalk, Ohio,
Defendant.

STIPULATION

It is hereby stipulated and agreed by and between counsel for plaintiff and defendant that exhibits marked "Approved as to form" by counsel for both parties may be offered in evidence without objection other than to the relevancy and materiality of such exhibits, and it is further agreed that the proceedings set forth in said exhibits occurred and that all of the parties thereto were duly constituted and that in all cases where execution and delivery would be required to make effective any instrument represented by any such exhibit, said execution and delivery did occur by and to the parties whose names appear on said exhibits, and in all cases where filing and recording is shown on such exhibits such filing and recording in accordance with such statements of filing and recording shall be deemed to have occurred. It is agreed that the headings on such exhibits are for identification purposes only. Each of the parties to this case waives as to all such exhibits the requirements as to certification of Title 28 U. S. C. A. 687 and 688.

Earl F. Boxell,
Of Attorneys for Plaintiff.

G. Ray Craig,
W. A. Eversman,
Attorneys for Defendant.

PLAINTIFF'S EXHIBIT No. 3

O.K. as to form—E. F. B., H. C. L.

ARTICLES OF INCORPORATION OF THE INCANDESCENT LIGHT & POWER COMPANY OF NORWALK, OHIO

THE INCANDESCENT LIGHT AND POWER COMPANY OF NORWALK, OHIO

The undersigned, D. H. Fox, Thomas Dinsmore, E. D. Sawyer, Charles Suhr, Eugene Smith and David King, citizens of the State of Ohio, hereby associate themselves to become a body corporate in accordance with the laws of said State under the following articles:

1. The name of the said corporation shall be The Incandescent Light and Power Company.

2. Said corporation shall be located and its principal business shall be located at Norwalk, Huron County, Ohio.

3. The purpose for which said corporation is to be formed is for the furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, electric and steam power and steam and electricity for heating, for profit.

4. The capital stock of said corporation shall be Twenty-five thousand dollars divided into two hundred and fifty shares of one hundred dollars each.

In witness whereof, they hereunto set their respective hands, this 7th day of March, 1891.

D. H. Fox
Thos. Dunmore
E. D. Sawyer
Charles Suhr
Eugene Smith
D. C. King.

State of Ohio, Huron County, Ohio, ss.-

On this 7th day of March, A. D. 1891, personally appeared before me the undersigned, a Notary Public within and for said County, the above named D. H. Fox, Eugene Smith, D. C. King, Thos. Dunmore, and Charles Suhr, who each severally acknowledged the signing of the foregoing articles of incorporation to be their free act and deed for the uses and purposes therein mentioned.

Witness my hand and seal on the day and year last aforesaid.

F. H. Jones,
Notary Public.

(Seal)

The State of Ohio, Huron County, ss.

I, R. K. Rood, Clerk of the Court of Common Pleas, being a Court of Record, within and for the County and State aforesaid, do hereby certify that F. H. Jones, Esq., was, at the date of taking the annexed ..... a Notary Public within and for said County, duly authorized to take the same; that I know his handwriting, and verily believe that the signature to said certificate is genuine; and that the annexed instrument is executed and acknowledged according to the laws of the State of Ohio.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Norwalk, this 7th day of March, A. D. 1891.

R. K. Rood,
Clerk.

(Seal)

The State of Ohio, Cuyahoga County, ss.

On this 9th day of March, A. D. 1891, personally appeared before me the undersigned, Notary Public within and for said County, the above named E. D. Sawyer, who acknowledged the signing of the foregoing articles of incorporation to be his free act and deed for the uses and purposes therein mentioned.

Witness my hand and seal on the day and year last aforesaid.

W. H. Clifford,
Notary Public.

(Seal)

The State of Ohio, Cuyahoga County, ss.

I, Levi E. Meacham, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid, do hereby certify that W. H. Clifford, before whom the annexed acknowledgment was taken, was at the date thereof a Notary Public, in and for said County, duly authorized by the laws of Ohio to take the same; that I am well acquainted with his handwriting, and believe his signature thereto is genuine; and that the annexed instrument is executed according to the laws of the State of Ohio.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said court, at Cleveland, this 9th day of March, A. D. 1891.

Levi E. Meacham,
Clerk.

(Seal)

CERTIFICATE OF SUBSCRIPTION

Norwalk, Ohio, March 12th, 1891.

To the Secretary of State, Columbus, Ohio:

We, the undersigned incorporators of The Incandescent Light and Power Company, do hereby certify that on the 12th day of March, 1891, all the incorporators of said Company did order, in writing, that books be opened for subscriptions to the capital stock of said Company, at its office in Norwalk, Ohio, on the 12th day of March, 1891, at 10 o'clock A.M.; and, at the same time waive, in writing, the notice by publication of the time and place of such opening of books of subscription, required by law; and, further, said books having been opened at the time and place ordered, that ten per cent. of the capital stock of said Company has been subscribed.

Thos. Dunmore
D. C. King,
E. D. Sawyer
Charles Suhr
Eugene Smith
D. H. Fox
Incorporators.

United States of America, State of Ohio,
Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Incandescent Light and Power Company, filed in this office on the 11th day of March, 1891; Vol. 48, Page 237; and Certificate of Subscription of said Company filed in this office on the 30th day of March, A. D. 1891, and recorded in Volume 50, Page 530, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 30th day of June, A. D. 1927.

Clarence J. Brown,
(Seal) Secretary of State.

PLAINTIFF'S EXHIBIT No. 4

O.K. as to form—E. F. B., H. C. L.

Deed of Assignment, dated Feb. 25, 1893, from The Incandescent Light & Power Co. to F. H. Jones and J. W. Foster, Assignees.

The Incandescent Light and Power Co., Assignors,
F. H. Jones and J. W. Foster, Assignees.

Proceedings had in the Probate Court of Huron County, Ohio, in the year of our Lord One Thousand Eight Hundred and Ninety-three, before George T. Thomas, Probate Judge within and for said county. Be it remembered that on the 25th day of February, A. D. 1893, F. H. Jones and J. W. Foster as assignees of The Incandescent Light and Power Co. filed herein the Original Deed of Assignment to them by said Incandescent Light and Power Co. made for the benefit of their creditors, which said deed of assignment and the proceeding had therein are in the words and figures following, to-wit:

DEED

Know all men by these presents that The Incandescent Light and Power Company, a corporation organized and existing under the laws of Ohio, for the consideration of one dollar, and the trusts hereinafter named, received to its full satisfaction of F. H. Jones and J. W. Foster hereby sells, assigns, grants and conveys, to said F. H. Jones and J. W. Foster all its lands, tenements, goods, chattels, choses in action, claims, interests, and property of every nature and kind whatsoever; to have and to hold the same unto said F. H. Jones and J. W. Foster in trust, nevertheless to convert the same into money and dispose of the same for the benefit equally of all creditors of said Corporation according to the laws of Ohio relating to insolvents. In Witness Whereof, the said corporation has caused its corporate seal to be hereto affixed, and the instrument to be executed by its president and secretary on this 25th day of February, A. D. 1893, by order of its board of directors duly adopted at a meeting held on the 25th day of February, A. D. 1893.

The Incandescent Light and Power Co.,
per D. W. Vail,
per Chas. Suhr, Sec'y.

Signed, sealed and delivered in presence of:
Charles E. Bloomer
F. M. Chaffee.

The State of Ohio, Huron County, ss.

Before me personally appeared the Incandescent Light and Power Company by D. W. Vail, its president, and Charles Suhr, its secretary, who acknowledged that they did sign and execute the foregoing instrument for and on behalf of said Corporation, and did affix said corporate seal by virtue of a resolution adopted by the board of directors of said corporation on the 25th day of February, A. D. 1893, and acknowledge that the same was the free act and deed of said Corporation of themselves as president and secretary thereof respectively.

In Witness Whereof, I hereunto set my hand and official seal this 25th day of February.

Charles E. Bloomer,
Notary Public.

Probate Court, Huron County, Ohio

J. E. February 25th, 1893.

On the 25th day of February, A. D. 1893, at 9:05 o'clock A. M. came F. H. Jones and J. W. Foster and filed in this court a deed of assignment to them from the Incandescent Light and Power Company of Norwalk, Huron County, Ohio, in trust for the benefit of its Creditors.

PROBATE COURT

The State of Ohio, Huron County.

I, J. M. Bechtol, sole Judge and Ex-officio Clerk of the Probate Court, within and for the aforesaid County and State do hereby certify that the foregoing is a true and correct copy of the original Deed of Assignment in the Matter of the Incandescent Light & Power Company and also Journal Entries in the same matter now on file in said Probate Court.

It Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Norwalk, Ohio, this 29th day of August, A. D. 1927.

J. M. Bechtol,
Judge and Ex-officio Clerk,
By Beatrice Lamm,
Dpy. Clk.

(Seal of Probate Court)

PLAINTIFF'S EXHIBIT No. 5

O.K. as to form—E. F. B., H. C. L.

Deed From The Incandescent Light and Power Co., (By Assignees) to George P. Jones, et al., Dated March 7, 1895.

Know All Men By These Presents, That whereas, J. W. Foster and F. H. Jones, the duly appointed and qualified assignees of The Incandescent Light & Power Company, an insolvent, on the 29th day of March, 1893, filed their certain petition in the Probate Court in and for Huron County, Ohio, against The Norwalk Foundry & Machine Company, et al., praying for an order to sell certain real estate, personal property and premises hereinafter described. And whereas, such proceedings were had therein that an order was made by said Court directing said assignees to sell the real estate and personal property hereinafter described at public auction upon the terms in said order set forth. And whereas, on the 1st day of March, 1895, due and legal notice of the time and place of sale having been given for thirty days as by said order provided, the said assignees sold the property and premises hereinafter described to George P. Jones and Mayme C. Foster for the sum of Thirteen Thousand Dollars, which sale was reported to said Court, and was by said Court examined, approved and confirmed on the 11th day of March, 1895, and said assignees were directed to execute and deliver to said purchasers a good and sufficient deed for the premises and property purchased by them, conveying the same to them in fee simple, free from all liens on the same for all debts due by said assignor. Now, therefore, we, J. W. Foster and F. H. Jones as assignees of The Incandescent Light and Power Company in consideration of the premises, of the authority vested in us by law, of the order of said Probate Court, and of the sum of Thirteen Thousand Dollars to us paid and secured to be paid by the said George P. Jones and Mayme C. Foster, have sold and do hereby bargain, sell and transfer and convey to the said George P. Jones and Mayme C. Foster, their heirs and assigns forever the aforesaid real estate and personal property, viz: consisting of an electric light plant consisting of a leasehold estate for the period of five (5) years from the 22nd day of September, 1890, with privilege of renewal of the following described property:

Situated in the County of Huron, City of Norwalk and State of Ohio, and being forty (40) feet off the east

end of lot 934, situated on the southeast corner of Benedict Avenue and Seminary Street in said City, with privilege of drive on the southeast end of said Lot No. 934, together with the buildings thereon, boilers, engines, pumps, dynamos, street wires, poles, lamps and all appliances, machines and articles used in and about the business of furnishing arc and incandescent lighting and heating and all franchises, patronage, good will and rights of said business, included in the above is the following: 1 100 H. P. boiler, John T. Noye; 2 90 H. P. boilers, J. C. McNiel Co.; 2 Duplex steam pumps, with connections; 1 heater, 1 exhaust receiver, all connections, pipes, etc. Engines: 1 209 H. P. John T. Noye; 1 150 H. P. John T. Noye; 1 65 H. P. Skinner Engine Company; 1 main shaft with clutch, pulleys, belts, etc., Dynamos, 1 No. 7 30 light Brush arc dynamo, 2 No. 8 65 light Brush arc dynamos, arc switch board with all connections, 1 650 light T. H. alternator with exciter, 2 500 light Westinghouse alternators with exciters, 2 incandescent switch boards with instruments and all connections, 3 Brush Arc Dials, 2 Exhaust fans, 125 brush Adams arc lamps, all poles and wire belonging to said plant, with all fixtures and appurtenances thereunto belonging.

To Have and To Hold the same to the said George P. Jones and Mayme C. Foster, their heirs and assigns forever, free from all liens on the same for all debts due by said Assignor.

In witness whereof, we, J. W. Foster & F. H. Jones, as assignees of The Incandescent Light & Power Company have hereunto set our hands and seals, this 7th day of March, 1895.

J. W. Foster, (Seal)
F. H. Jones, (Seal)
Assignees of The Incandescent
Light & Power Company.

Signed, sealed and delivered in presence of us:
J. E. Erf,
Mary L. Timbs.

The State of Ohio, Huron County, ss.

Be It Remembered that on the 11th day of March, in the year of our Lord one thousand eight hundred and ninety-five, before me the subscriber, a Notary Public in and for said County, personally came J. W. Foster and F. H. Jones, Assignees of The Incandescent Light and Power Company and acknowledged the signing and sealing of the foregoing deed to be their voluntary act and deed for the uses and purposes therein mentioned. In

testimony whereof, I have hereunto subscribed my name affixed my notarial seal on the day and year last aforesaid.

J. E. Erf,
(Seal) Notary Public, Huron County, Ohio.

The above deed was received for record by the Recorder of Huron County, Ohio, March 11, 1895, at 9:45 A. M., and recorded March 13, 1895, in Deed Records of Huron County, Ohio, Vol. 51, pages 319 and 320.

PLAINTIFF'S EXHIBIT No. 6

O.K. as to form—E. F. B., H. C. L.

THESE ARTICLES OF INCORPORATION

of

THE NORTHERN ELECTRIC COMPANY

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Northern Electric Company.

Second. Said corporation is to be located at Norwalk, in Huron County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing and producing electricity for light, heat and power.

Fourth. The capital stock of said corporation shall be Twenty-five thousand Dollars, ($25,000.00), divided into Two Hundred and Fifty (250) shares of One Hundred Dollars ($100.00) each.

In Witness Whereof, We have hereunto set our hands, this 30th day of April, A. D. 1895.

George P. Jones
Park Foster
Mayme C. Foster
Burton P. Foster
John W. Foster

Norwalk, Ohio, June 25, 1897.

To the Honorable Secretary of State,
Columbus, Ohio.

The Northern Electric Company and Parks Foster, its President and B. P. Foster, its Secretary, hereby certify that at a meeting of its stockholders, held on the 23rd day of Dec., 1896, notice of which had been duly waived, the following amendments of its articles of incorporation were adopted by vote of all its stockholders.

"Resolved, That the articles of incorporation of The Northern Electric Company be and they are hereby amended by changing the name of said company to The Northern Gas and Electric Company," and,

"Resolved, That the articles of incorporation of The Northern Electric Company be and they are hereby amended so as to modify and enlarge the objects and purposes for which said company was organized, by authorizing and empowering said company to sell or otherwise dispose of electricity for light, heat and power purposes, and to manufacture and sell or otherwise dispose of gas for fuel, heating, power or other purposes, and to acquire a plant and lay conductors therefor through the streets, alleys and other public places of the city of Norwalk, Ohio, and other places in said City, and to sell coke and all other products incidental to such manufacture."

and that said amendments, as above set forth, are true copies of the original amendments.

In witness whereof, said company has caused its name and corporate seal to be hereto affixed, and this certificate to be signed by its President and Secretary, on the day and year first above mentioned.

The Northern Electric Company
By Parks Foster,
President
B. P. Foster
(seal) Secretary

United States of America, State of Ohio,
Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Northern Electric Company filed the 17th day of May, 1895; Vol. 67, Page 294; and Certificate of Amendment of The Northern Gas and Electric Company filed in this office on the 16th day of July A. D. 1897 and recorded in Volume 72, Page 220, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 14th day of January, A. D. 1930.

Clarence J. Brown,
Secretary of State.

PLAINTIFF'S EXHIBIT No. 7

O.K. as to form—E. F. B., H. C. L.

Deed from George P. Jones, et al., to The Northern Electric Company, dated May 20, 1895.

Know All Men by These Presents That we, George P. Jones of the County of Hancock and Mayme C. Foster of the County of Huron and State of Ohio, for and in consideration of the sum of Eighteen Thousand Dollars to us in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained and sold and by these presents do grant, bargain, sell, convey and confirm unto The Northern Electric Company of the County of Huron and State of Ohio, its successors, heirs and assigns, all the following described real estate, with the appurtenances, situate in the City of Norwalk, County of Huron and State of Ohio and bounded and described

as follows, viz: consisting of an Electric Light plant, consisting of a leasehold estate for the period of five (5) years from the 22" day of September 1890 with privilege of renewal of the following described property, situated in the County of Huron, City of Norwalk and State of Ohio, and being forty (40) feet off the east end of Lot 934, situated on the southeast corner of Benedict Avenue and Seminary Street in said City, with privilege of drive on the southeast end of said lot 934, together with the buildings thereon, boilers, engines, pumps, dynamos, street wires, poles, lamps and all appliances, machines, and articles used in and about the business of furnishing arc and incandescent lighting and heating and all franchises, patronage, good will and rights of said business, included in the above is the following: 1 100 H.P. Boiler John T. Noye, 2 90 H.P. boilers, J. C. McNiel Co., 2 duplex steam pumps with connections, 1 Heater, 1 exhaust receiver, all connections, pipes, etc., Engines: 1 209 H.P. John T. Noye, 1 150 H.P. John T. Noye; 1 65 H.P. Skinner Engine Company, 1 main shaft with clutch, pulleys, belts, etc. Dynamos. 1 No. 7 30 light Brush arc dynamo, 2 No. 8 65 light Brush arc dynamos, arc switchboard with all connections. 1 650 light T. H. alternator with exciter, 2 500 Westinghouse alternators with exciters, 2 incandescent switchboards, with instruments and all connections. 3 Brush arc dials, 2 exhaust fans, 125 Brush Adams arc lamps, all poles and wires belonging to said plant, with all fixtures and appurtenances thereto belonging, and all the estate, title and interest of the said Grantors, either in law or in equity, of, in and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof.

To Have and to Hold the same to the only proper use of the said Grantee, its successors, heirs and assigns forever, and the said George P. Jones and Mayme C. Foster, for themselves and for their heirs, executors and administrators, do hereby covenant with the said Grantee, its successors, heirs and assigns, that they are the true and lawful owners of the said premises, and have full power to convey the same, that the title so conveyed is clear, free and unincumbered, and further, that they do warrant and will defend the same against all claim or claims of all persons whomsoever, except a mortgage on said property given by said Grantors to J. W. Foster and F. H. Jones, assignees of The Incandescent Light and Power Company to secure two (2) promissory notes executed by said Grantors to said As-

signees, each for the sum of Four Thousand Three Hundred and Thirty three and 33/100 Dollars ($4333.33), one due in six (6) months from date, and the other due one year from date, each dated at Norwalk, Ohio, on or about the 1st day of March, 1895, which mortgage the Grantee hereby assumes and agrees to pay as part of the consideration for this conveyance.

In witness whereof, the said George P. Jones, Mayme C. Foster, have hereunto set their hands, this 20th day of May in the year of our Lord One Thousand eight hundred and ninety five.

George P. Jones,
Mayme C. Foster.

Signed and acknowledged in presence of us:
F. H. Jones
Mary L. Timbs.

State of Ohio, ... County, ss.

Be it Remembered that on the 21" day of May in the year of our Lord one thousand eight hundred and ninety five, before me, the subscriber, a Notary Public in and for said County, personally came George P. Jones and Mayme C. Foster, the Grantors in the foregoing deed and acknowledged the signing thereof to be their voluntary act for the uses and purposes therein mentioned. In testimony whereof, I have hereunto subscribed my name and affixed my Notarial seal on the day and year last aforesaid.

F. H. Jones,
(Seal) Notary Public.

The above deed was received for record by the Recorder of Huron County, Ohio, August 27, 1895 at 2 P.M., and recorded August 27, 1895 in Deed Records of Huron County, Ohio, Volume 52, pages 51 and 52.

PLAINTIFF'S EXHIBIT No. 8

O.K. as to form—E. F. B., H. C. L.

THESE ARTICLES OF INCORPORATION
of
THE NORWALK GAS AND ELECTRIC COMPANY

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Norwalk Gas and Electric Company.

Second. Said corporation is to be located at Norwalk in Huron County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing, producing, furnishing and selling gas and electricity, or either, for light, heat, power and other purposes, and for doing all things incident to said purpose.

Fourth. The capital stock of said corporation shall be One Hundred and Twenty-five Thousand Dollars ($125,000.00), divided into One Thousand Two Hundred and Fifty (1,250) shares of One Hundred Dollars ($100.00) each.

In Witness Whereof, We have hereunto set our hands, this seventeenth day of April, A. D. 1900.

F. H. Jones,
Ed L. Young,
J. A. Nestor,
A. V. Andrews,
A. L. Osborn,
S. E. Crawford,
E. W. VanDusen.

The State of Ohio, County of Huron, ss.

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 19th day of April, A. D. 1900, the above named F. H. Jones, Ed L. Young, J. A. Nestor, A. V. Andrews, A. L. Osborn, S. E. Crawford and F. W. VanDusen who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

Charles R. Summers,
Notary Public.

(Seal)

The State of Ohio, County of Huron, ss.

I, C. D. Miles, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Charles R. Summers whose name is subscribed to the foregoing acknowledgment as a Notary Public was at the date thereof a Notary Public, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Norwalk, O., this 19 day of April, A. D. 1900.

C. D. Miles,
Clerk.

(Seal)

United States of America, State of Ohio, Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of the The Norwalk Gas and Electric Company filed in this office on the 20th day of April, A. D. 1900, and recorded in Volume 81, page 522, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 9th day of April, A. D. 1927.

Clarence J. Brown,
Secretary of State.

(Seal)

PLAINTIFF'S EXHIBIT No. 9

O.K. as to form—E. F. B., H. C. L.

Deed from The Northern Gas and Electric Company to The Norwalk Gas and Electric Co., Dated May 8, 1900

Know All Men By These Presents that The Northern Gas and Electric Company, a corporation duly organized and existing under the laws of the State of Ohio, the Grantor, for one dollar and other valuable considerations, received to its full satisfaction from The Norwalk Gas and Electric Company, a corporation duly organized and existing under the laws of the State of Ohio, the Grantee, does give, grant, bargain, sell and convey unto said Grantee, its successors and assigns, the following described premises: Situated in the City of Norwalk, County of Huron and State of Ohio, and described as follows:

1. All that part of the east half of Great Lot No. 95 in Section 4 Norwalk Township, bounded on the north by the right of way of The Wheeling & Lake Erie Railroad Company, on the west by the west line of the east half of said Lot No. 95; on the south by the north line of a right of way sixty-six feet wide running parallel with said Railroad right of way and 132 feet (measured at right angles) distant therefrom, and on the east by a line running parallel with said West line of said East one-half of lot 95 and 278.04 feet easterly therefrom. Also a right in common with C. H. Gallup and Lizzie F. Gallup, their heirs and assigns, to said sixty-six foot right of way, viz: A strip of land sixty-six feet wide running from Woodlawn Avenue on the east to the west line of said east half of lot ~~No.~~ 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said Wheeling & Lake Erie Railroad Company's right of way and running parallel therewith.

2. Also a leasehold of four by ten rods off the West end of said sixty foot strip, for description of land and extent of title leased, reference is hereby made to lease record Vol. 2 pages 12 and 13 Huron County, Ohio.

And also all the gas and electric systems of the Grantor, all its plants, gas works, power stations, machinery, enginees, boilers, dynamos, electric machines, gas machines, meters, lamps and other appliances and apparatus, poles, lines, wires, pipes, lamp-posts, pipe line, tubing gauges, cocks, valves, meter-testers, stop boxes,

transformers, switch-boards, and all other appliances, apparatus, and appurtenances of every kind and description to the said plants and property belonging or in any wise appertaining. And also all powers, right, franchises and privileges of the Grantor incident or necessary to the ownership, maintenance, and operation of the said plants, gas and electric systems, lines, pipes, and property aforesaid. And also all rights of way, licenses, easements, leases, leasehold interest, buildings, erections, superstructures, machine shops, tools, implements, machinery and supplies, together with the good will and all contracts of the Grantor. And also all and singular the tenements, hereditaments and appurtenances belonging or in any wise appertaining unto the aforesaid property, rights, franchises and privileges, and the reversions, remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Grantor, of, in and to the above described premises, property, rights, franchises and privileges and every part thereof with the appurtenances. It being the intention of the Grantor to convey to the Grantee, its successors and assigns, all of its property, real, personal, and mixed, rights, franchises and privileges, excepting only two parcels of land, in the City of Norwalk, Ohio, one fronting two rods on the north side of League Street in said City, and the other being known as Inlot No. 284 in the plat of the Homestead League, and the personal property and fixtures situated on said two parcels of land, conveyed by deed of even date herewith to J. L. Fuller.

To Have and To Hold the above granted and bargained premises, rights, franchises and privileges unto the Grantee, its successors and assigns forever. And the said Grantor does, for itself and its successors, covenant with the said Grantee, its successors and assigns, that at and until the ensealing of these presents, it is well seized of the above described premises, property, rights, franchises and privileges, as a good and indefeasible estate in fee simple or an equivalent estate, according to the nature of the property conveyed, and has good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all incumbrances whatsoever, and that it will warrant and defend the same with the appurtenances thereunto belonging to the said Grantee, its successors and assigns forever, against all lawful claims and demands whatsoever.

In witness whereof, the Northern Gas and Electric Company, by its Vice President and Secretary, thereunto

lawfully authorized by action of its stockholders and directors, has hereunto set its corporate name and affixed its corporate seal, this 8th day of May, A. D. 1900.

The Northern Gas and Electric Company,
By W. S. Hayden, Vice President,
Frank J. Smith, Secretary. (Seal)

Signed, sealed and delivered in presence of:
Mark P. Squire
D. W. Myers.

The State of Ohio, Cuyahoga County, ss.

Before Me, the undersigned, a Notary Public within and for said County in the State aforesaid, personally appeared the above named, W. S. Hayden and Frank J. Smith to me known and known to me to be respectively the Vice President and Secretary of The Northern Gas and Electric Company, the corporation which executed the foregoing instrument, who acknowledged that they did sign and seal said instrument as such Vice President and Secretary, respectively, for and on behalf of said corporation and that the same is their free act and deed individually and as such respective officers, and the free and corporate act and deed of said The Northern Gas and Electric Company.

In witness whereof, I have hereunto set my hand and official seal, this 8th day of May, A. D. 1900.

$100.00 U. S. R. stamp attached and cancelled.

Ernest H. Rowe,
(Seal) Notary Public.

The above deed was received for record by the Recorder of Huron County, Ohio, May 12, 1900, at 3:45 P.M., and recorded May 18, 1900, in Deed Records of Huron County, Ohio, Volume 58, pages 284, 285 and 286.

PLAINTIFF'S EXHIBIT No. 10

O.K. as to form—E. F. B., H. C. L.

ORGANIZATION AND FRANCHISE
OF
THE CLEVELAND AND SOUTH-WESTERN
TRACTION COMPANY

This Agreement of Consolidation, made and entered into on this 9th day of December A.D. 1902, by and between The Cleveland, Elyria and Western Railway Company, a corporation of the State of Ohio, and its Directors, party of the first part, and The Cleveland and Southern Railway Company, a corporation of the State of Ohio, and its Directors, party of the second part, each of said companies acting through and by the unanimous action and concurrence of their respective Boards of Directors.

Witnesseth: That Whereas, the laws of the State of Ohio provide, that whenever the lines, or authorized lines, of road of any street railroad Corporations or companies meet or intersect, or can be conveniently operated from one power house, or from a power house, or power houses, owned, under lease, or operated by one of such street railroad companies or corporations, or whenever any such line of any street railroad corporation or company and that of any railroad operated by electricity may be conveniently connected to be operated to mutual advantage, or whenever any such line of any street railroad corporation or company, or the railway of any company operated by electricity, can be conveniently operated from one power house, or from a power house, owned, under lease, or operated by one of such street railroad corporations or companies, or by any company or corporation the railway of which is operated by electricity, such corporations or companies, or any two or more of them, are authorized to consolidate themselves into a single corporation, provided they are not competing lines; and

Whereas, The Cleveland, Elyria and Western Railway Company now has and owns authorized lines of street railway from a point in the township of Brooklyn in the County of Cuyahoga and State of Ohio, at the intersection of Lorain Street with the westerly corporation line of the City of Cleveland, Ohio, to the following points, to-wit: a point in the hamlet of Rockport in the County of Cuyahoga and State of Ohio; a point in the Village of Berea in The County of Cuyahoga and State

of Ohio, a point in the Township of Norwalk in the County of Huron and State of Ohio, a point in the Village of North Amherst in the County of Lorain and State of Ohio, a point in the City of Lorain in the County of Lorain and State of Ohio, a point in the Village of Wellington in the County of Lorain and State of Ohio, a point in the Village of Grafton in the County of Lorain and State of Ohio; all of said lines of street railway being within the Counties of Cuyahoga, Lorain, Erie and Huron in the State of Ohio; and

Whereas, The Cleveland and Southern Railway Company, party of the second part, now has and owns an authorized line of electric railroad from a point in the Village of Berea in the County of Cuyahoga and State of Ohio, to a point in the City of Wooster, Wayne County, Ohio; all of said line of electric railroad being within the Counties of Cuyahoga, Medina and Wayne in the State of Ohio; and

Whereas, the lines of railway of the corporations parties hereto meet and intersect and are operated by electricity and are not competing lines and can be conveniently connected and operated to mutual advantage, and can be conveniently operated from power houses owned by one of said companies; and

Whereas, for the greater convenience of the public, and for the mutual advantage and benefit of the stockholders of each of said companies, the Directors of said companies have proposed, by and with the assent, approval and ratification of the stockholders of each of said companies, to be had in due form of law at meetings to be regularly called and held for that purpose, to unite and consolidate the capital stock, property and franchises of the said companies into one corporation;

Now, Therefore, the parties hereto, in conformity to the statute in such case made and provided, the said railroad companies acting under and in pursuance of the resolution of their Board of Directors, and upon the assent and ratification of the stockholders of said companies, to be had and made, as hereinbefore set forth, do hereby agree to and with each other to, and do hereby, unite and consolidate their said capital stock, railroads, property and franchises into one company, upon the following terms and conditions, to-wit:

First: The name of said consolidated company shall be The Cleveland and South-Western Traction Company.

Second: The officers of said company shall consist of a President, first Vice-President, second Vice-President, Secretary and Treasurer, whose places of residence shall be the State of Ohio.

Third: The number of Directors of said Company shall be eleven (11), whose places of residence shall be the State of Ohio, and the names and places of residence of the Directors of said Company who are to hold office until their successors are elected by the stockholders, at the meeting appointed by the stockholders, called to take this Agreement into consideration, pursuant to Section 3383 of the Revised Statutes of Ohio, are as follows:

A. H. Pomeroy, Berea, Ohio
F. T. Pomeroy, Cleveland, Ohio
M. J. Mandelbaum, Cleveland, Ohio
H. Q. Sargent, Cleveland, Ohio
L. M. Coe, Berea, Ohio
A. E. Akins, Cleveland, Ohio
F. L. Fuller, Cleveland, Ohio
W. H. Lamprecht, Glenville, Ohio
S. C. Smith, Cleveland, Ohio
M. A. Sprague, Berea, Ohio

Fourth: The names and residences of the officers of the company who shall remain in office until their successors are elected by the Board of Directors, to be elected at the meeting of the stockholders appointed as mentioned in the paragraph last above of this Agreement, and until their successors so elected are qualified, are as follows:

A. H. Pomeroy, President, Berea, Ohio
A. E. Akins, 1st Vice President, Cleveland, Ohio
S. C. Smith, 2nd Vice-President, Cleveland, Ohio
E. F. Schneider, Secretary, Cleveland, Ohio
F. T. Pomeroy, Treasurer, Cleveland, Ohio

Fifth: The principal office of the Company shall be in the Village of Berea, in the County of Cuyahoga and State of Ohio.

Sixth: The capital stock of the Company, which shall consist of common and preferred stock shall be Three Million Dollars ($3,000,000) of common stock divided into thirty thousand (30,000) shares of the par value of One Hundred Dollars ($100.00) each; and two Million Dollars ($2,000,000.00) of preferred stock divided into twenty thousand (20,000) shares of One Hundred Dollars ($100.00) each; and each share of the preferred stock of the company shall be entitled to dividends at the rate of five per centum per annum, payable semi-annually, out of the surplus profits of the Company each year, prior to the payment of any dividends upon the common stock, and such dividends upon the preferred stock shall be cumulative, and in case of the

insolvency or dissolution of the corporation, the holders of the preferred stock shall be entitled to receive from the assets remaining after paying its debts and liabilities, the full payment of the par value of such preferred stock before anything is paid to the common stock, and the shares of common and preferred stock of the Company shall have equal voting power.

Seventh: Thirty thousand (30,000) shares of the common stock and twelve thousand (12,000) shares of the preferred stock shall be distributed in exchange for all of the capital stock of the two companies, as follows, to-wit:

To the stockholders of The Cleveland, Elyria and Western Railway Company twenty thousand (20,000) shares of said common stock, and twelve thousand (12,000) shares of said preferred stock, to be divided pro rata according to the holdings, among the stockholders of said last named Company.

To the stockholders of The Cleveland and Southern Railway Company ten thousand (10,000) shares of said common stock, to be divided pro rata according to the holdings, among the stockholders of said last named Company.

Eighth: Five Hundred (500) shares of preferred stock of the Company shall, in connection with five hundred (500) of the bonds of the Company hereinafter provided for, be issued and used for the purpose of retiring as soon as possible five hundred and fifty (550) of the outstanding bonds hereinafter referred to, of said The Cleveland and Southern Railway Company.

Ninth: Four thousand five hundred (4,500) shares of the preferred stock of the Company shall be sold at par to the Managing Committee of the holders of the bonds above referred to, of said The Cleveland and Southern Railway Company, and if any of said four thousand five hundred (4,500) shares of said preferred stock are not taken by said Managing Committee of the Bondholders of The Cleveland and Southern Railway Company, they shall be disposed of by the Board of Directors of The Cleveland and South-Western Traction Company according to law, in such amounts, at such time and in such manner as the interests of the Company may require.

Tenth: The remaining three thousand (3,000) shares of the preferred stock of The Cleveland and South-Western Traction Company shall be disposed of by its Board of Directors, according to law, in such amounts, at such times and in such manner as the interests of the Company may require.

Eleventh: The Cleveland and South-Western Traction Company assumes all the debts, liabilities and contracts of the constituent companies and is to pay off and extinguish all debts and liabilities of every kind and nature, of each constituent company.

Twelfth: The Cleveland and South-Western Traction Company shall, as herein provided, and the Board of Directors of said Company is hereby authorized and empowered to, issue on behalf of said Company and in its corporate name, its bonds in the amount of Three Million Dollars ($3,000,000.00), to be dated February 1st, 1903, payable twenty years after the date of said bonds, but redeemable, in the manner, and for the sum to be provided in the trust deed or mortgage securing the same, ten years after the date thereof, or at any interest maturing period thereafter, at the option of said Company. Said bonds to be of the denomination of One Thousand Dollars ($1,000.00) each, to be payable in the gold coin of the United States of America of the present standard of weight and fineness, and to bear interest at the rate of five per centum per annum, payable semi-annually, in the gold coin aforesaid; said interest to be evidenced by coupons attached to said bonds; said bonds to be secured by a mortgage or deed of trust, conveying to The Federal Trust Company, of Cleveland, Ohio, as Trustee, by way of security for said bonds, all of the property and franchises of the Company, now owned and hereafter to be acquired by it. No one of the bonds above mentioned shall be deemed issued or be valid or secured by the mortgage or deed of trust above provided for, until the same shall have been authenticated by the Federal Trust Company, as Trustee, or its successors in the trust.

Of said bonds of The Cleveland and South-Western Traction Company, five hundred (500) of said bonds shall be issued and used in connection with five hundred (500) shares of the preferred stock of the Company hereinbefore referred to, for the purpose of retiring as soon as possible five hundred and fifty (550) bonds heretofore issued, out of a total authorized issue of one thousand (1000) bonds, four hundred and fifty (450) of which last mentioned bonds it is agreed have not been heretofore and shall not hereafter be issued and shall be cancelled, of The Cleveland and Southern Railway Company, dated the 1st day of July, 1901, and secured by a mortgage or deed of trust dated the first day of July, 1901, given by said The Cleveland and Southern Railway Company to The Cleveland Trust Company of Cleveland, Ohio.

Of said bonds of The Cleveland and South-Western Traction Company, fifteen hundred (1500) thereof shall remain in the hands of the trustee under said mortgage, for future issue, and shall be authenticated and issued only for the purpose of retiring as soon as possible an issue of bonds of The Cleveland, Elyria and Western Railway Company, of the par value of One Million Five Hundred Thousand Dollars ($1,500,000.00), said issue of bonds last referred to being a series of fifteen hundred (1500) bonds of the par value of One Thousand Dollars ($1,000.00) each, dated the first day of August, 1900, and secured by a mortgage or deed of trust, dated the first day of August, 1900, and given by The Cleveland, Elyria and Western Railway Company to The Western Reserve Trust Company, of Cleveland, Ohio as Trustee; of which said fifteen hundred (1500) bonds of The Cleveland, Elyria and Western Railway Company last mentioned, one thousand (1,000) have been issued and sold and are now outstanding, and seventy-three (73) of which have been issued and used to retire seventy-three (73) of an issue of One Thousand Dollar bonds of The Cleveland, Berea, Elyria and Oberlin Railway Company, hereinafter mentioned, and are now outstanding; and of which bonds of The Cleveland, Elyria and Western Railway Company, four hundred and twenty-seven (427) remain in the hands of the Trustee for future issue, and are to be issued only for the purpose of retiring as soon as possible four hundred and twenty-seven (427) out of a total issue of five hundred (500) bonds of The Cleveland, Berea, Elyria and Oberlin Railway Company, of the par value of Five Hundred Thousand Dollars ($500,000.00); said issue of bonds of The Cleveland, Berea, Elyria and Oberlin Railway Company last mentioned, being a series of five hundred (500) bonds of the par value of One Thousand Dollars ($1,000.00) each, dated March 1st, 1899, secured by a mortgage or deed of trust, and given by The Cleveland, Berea, Elyria and Oberlin Railway Company to the Cleveland Trust Company of Cleveland, Ohio, as Trustee; of which said five hundred (500) bonds last mentioned, seventy-three (73) have been retired; one hundred and twenty-seven (127) have been issued and sold and are now outstanding, and three hundred (300) of which are issued and deposited with The Cleveland Trust Company, of Cleveland, Ohio, to be held by it in escrow and used for the purpose of redeeming the following issues of bonds, viz.:

(1) An issue of four hundred bonds of The Cleve-

land and Elyria Electric Railroad Company, of the par value of Five Hundred Dollars ($500.00) each, dated May 1st, 1895, and secured by a mortgage or deed of trust, dated May 1st, 1895, given by said The Cleveland and Elyria Electric Railroad Company to The Savings and Trust Company of Cleveland, Ohio.

(2) An issue of two hundred bonds of The Elyria and Oberlin Electric Railway Company, of the par value of Five Hundred Dollars ($500.00) each, dated August 1st, 1897, and secured by a mortgage or deed of trust, dated August 1st, 1897, given by the said The Elyria and Oberlin Electric Railway Company to The Cleveland Trust Company of Cleveland, Ohio.

Of said bonds of The Cleveland and South-Western Traction Company, one hundred (100) thereof shall remain in the hands of the Trustee under said mortgage, for future issue, and shall be authenticated and issued only for the purpose of retiring as soon as possible an issue of bonds of The Elyria, Grafton and Southern Railway Company, now outstanding, of the par value of One Hundred Thousand Dollars ($100,000.00), heretofore issued by the last named Company, dated the first day of January, 1902, which last mentioned issue of bonds were guaranteed by The Cleveland, Elyria and Western Railway Company, and are secured by a mortgage or deed of trust, dated January 1st, 1902, made by said The Elyria, Grafton and Southern Railway Company to The Federal Trust Company of Cleveland, Ohio, as Trustee.

The remaining nine hundred (900) bonds of The Cleveland and South-Western Traction Company shall be issued from time to time, upon resolutions of the Directors of the Company, adopted at any regular or special meeting of the Directors, and sold or otherwise used for the purpose of providing for the payment of the floating debts of the said constituent companies, which are assumed by The Cleveland and South-Western Traction Company; for the purpose of making necessary extensions, improvements, equipments and additional equipments of the lines of the consolidated company and extensions thereof, and the acquisition, equipment and additional equipment of other lines of railway and extensions thereof; and for the purpose of leasing or purchasing all the property, real, personal and mixed, and all the franchises, rights and privileges of any company or companies organized for the purpose of supplying electricity or natural gas, artificial gas, or both electricity and natural or artificial gas, for power, light, heat or fuel purposes, or which has been engaged in such

business in whole or in part, in any municipality of the State of Ohio, and for such other lawful purposes as shall be found advisable by the Board of Directors of said Consolidated Company.

Thirteenth: All of the affairs, property and business of the said The Cleveland and South-Western Traction Company shall be under the control of the Board of Directors of said Company, who shall have full power in the management and control of the business of the Company, subject to the laws of the State of Ohio.

Fourteenth: The said The Cleveland, Elyria and Western Railway Company, party of the first part, and The Cleveland and Southern Railway Company, party of the second part, hereby respectively grant, convey, transfer and set over, to the consolidated, The Cleveland and South-Western Traction Company, all their respective rights, franchises and property of every description whatsoever, and hereby respectively transfer to said The Cleveland and South-Western Traction Company their respective books, papers, furniture and assets of every description whatsoever; it being especially understood and agreed that when this Consolidation Agreement has been consented to and ratified by the stockholders of each of said Companies, in accordance with law, this Agreement shall constitute a conveyance to the consolidated company, The Cleveland and South-Western Traction Company, of all the rights, property, franchises, privileges, books, papers and assets of every description, of the two constituent companies signing this Agreement.

In Witness Whereof, each of the above named constituent companies and the Directors of said Companies as well, parties hereto, have caused these presents to be signed by said Directors, and by the President and Secretary of each of said Companies, and have caused their respective corporate seals to be hereto affixed, the day and year first above written.

The Cleveland, Elyria and Western Railway Company

By A. H. Pomeroy, President

E. F. Schneider, Secretary,

Directors of The Cleveland, Elyria and Western Railway Company

A. H. Pomeroy	F. T. Pomeroy
A. E. Akins	F. L. Fuller
M. H. Sprague	H. Q. Sargent
L. M. Coe	Levi E. Meacham
S. C. Smith	M. J. Mandelbaum
O. D. Pomeroy	

The Cleveland and Southern
Railway Company
By W. H. Lamprecht, President
F. L. Fuller, Secretary

Directors of The Cleveland and Southern
Railway Company

W. H. Lamprecht	M. L. Mandelbaum
Frank Grim	F. L. Fuller
F. T. Pomeroy	A. H. Pomeroy
O. F. Mueller	A. E. Akins
J. W. Roof	

The State of Ohio, Cuyahoga County, ss.

I, E. F. Schneider, Secretary of The Cleveland, Elyria and Western Railway Company, do hereby certify that a meeting of the stockholders of said Company was held at the office of the Company in the Village of Berea, Cuyahoga County, Ohio, on the 15th day of January, 1903, for the purpose of considering the within agreement of Consolidation. I do further Certify that due notice as required by law, of the time and place of holding said meeting and the objects thereof had been previously given to each of the persons in whose names the capital stock of the Company then stood and now stands on the books thereof. I do certify that the persons in whose name 19784 shares of the capital stock of the Company then stood and now stands on the books of the Company, all being stockholders of said Company, were present at said meeting in person or by proxy.

I do further certify that the within agreement of consolidation was submitted for the consideration of said meeting, and a vote by ballot was taken for the adoption or rejection of the same. That 19784 shares of the stock of said Company (all of which was and is fully paid up and upon none of the shares of which were there any unpaid installments called for by the Board of Directors) were voted in person or by proxy by the stockholders entitled to vote the same; one vote being cast for each share of stock by the holder thereof, and that said agreement was adopted by 19784 shares of the stock of said Company cast in favor of said adoption and no shares being cast in favor of said rejection, the vote cast in favor of the adoption of said agreement being more than two-thirds of the capital stock subscribed of the Company.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Company, this 21st day of January, A. D. 1903.

E. F. Schneider, Secretary
of The Cleveland Elyria and Western Railway Company.

The State of Ohio, Cuyahoga County, ss.

I, F. L. Fuller, Secretary of The Cleveland and Southern Railway Company, do hereby certify that a meeting of the stockholders of said Company was held at the office of the Company in the City of Cleveland, Cuyahoga County, Ohio, on the 15th and 21st days of January, A. D. 1903, for the purpose of considering the within agreement of consolidation. I do further certify that due notice as required by law, of the time and place of holding said meeting and the objects thereof had been previously given to each of the persons in whose names the capital stock of the Company then stood and now stands on the books thereof. I do certify that the persons in whose name 10,000 shares of the capital stock of the Company then stood and now stands on the books of the Company, all being stockholders of said Company, were present at said meeting in person or by proxy.

I do further certify that the within agreement of consolidation was submitted for the consideration of said meeting, and a vote by ballot was taken for the adoption or rejection of the same. That 10,000 shares of the capital stock of said company (all of which was and is fully paid up and upon none of the shares of which were there any unpaid installments called for by the Board of Directors) were voted in person or by proxy by the stockholders entitled to vote the same; one vote being cast for each share of stock by the holder thereof, and that said agreement was adopted by 10,000 shares of the stock of said Company cast in favor of said adoption and no shares being cast in favor of said rejection, the vote cast in favor of the adoption of said agreement being more than two-thirds of the capital stock subscribed of the company.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Company, this 21st day of January, A. D. 1903.

(Seal) F. L. Fuller, Secretary
of The Cleveland and Southern Railway Company

United States of America, State of Ohio,
Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Agreement of Consolidation between The Cleveland, Elyria and Western Railway Company, The Cleveland and Southern Railway Company, into The Cleveland and South-Western Traction Company filed in this office on the 21st day of January, A. D. 1903, and recorded in Volume 82, Page 677, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 14th day of January, A. D. 1930.

(Signed) Clarence J. Brown,
(Seal) Secretary of State.

PLAINTIFF'S EXHIBIT No. 11

O.K. as to form—E. F. B., H. C. L.

AGREEMENT BETWEEN THE NORWALK GAS AND ELECTRIC AND THE CLEVELAND AND SOUTHWESTERN TRACTION COMPANY, DATED FEBRUARY 14, 1903.

This agreement made and entered into this 14th day of February, A. D. 1903, by and between The Norwalk Gas and Electric Company, party of the first part, and The Cleveland and South-Western Traction Company, party of the second part, both of said companies being corporations duly and legally organized under the laws of the State of Ohio,

Witnesseth:

That upon the considerations, terms and conditions hereinafter expressed on the part of said The Cleveland and South-Western Traction Company, party of the sec-

ond, part, to be kept and performed, the said The Norwalk Gas and Electric Company, party of the first party, hath granted, bargained, sold, remised, released, aliened, conveyed, confirmed, assigned, transferred and set over and by these presents doth grant, bargain, sell, remise, release, alien, convey, confirm, assign, transfer and set over unto The Cleveland and South-Western Traction Company, its successors and assigns forever, all the gas and electric lighting plants and all other property whatsoever owned and operated, constructed and held by the party of the first part, wheresoever situate; also all other property, real, personal and mixed, and all the franchises, rights and privileges which it now owns, together with all and singular the real estate, lands, tenements and hereditaments of every name and nature which it now owns, wherever situate; and all and singular its property of every name and description in law or in equity, which it now owns, subject to all existing debts, liabilities obligations and contracts of every kind and character of The Norwalk Gas and Electric Company, which the said The Cleveland and South-Western Traction Company, its successors and assigns, assumes and agrees to pay, liquidate and perform, as one of the considerations for the conveyance hereby made.

In consideration of the above and foregoing conveyance made to it by the party of the first part, the party of the second part, for itself, its successors and assigns, hereby agrees to pay to the party of the first part the sum of One Hundred Thousand Dollars ($100,000.00), cash in hand, upon the delivery to it, the party of the second part, its successors and assigns, by the party of the first part, of possession of all the gas and electric lighting plants and properties aforesaid, under and in pursuance of the terms of this agreement; and as a further consideration for the conveyance and transfer to it of the gas and electric lighting plants and properties aforesaid, the said The Cleveland and South-Western Traction Company, for itself, its successors and assigns, hereby assumes and agrees to pay, liquidate and perform all debts, liabilities, obligations and contracts of every kind and character of said The Norwalk Gas and Electric Company, existing at the date upon which possession of the said gas and electric lighting plants and properties above mentioned is surrendered to it by said party of the first part, in pursuance hereof.

It is further mutually agreed and hereby intended, that all property of every name and description in law or in equity, wherever situated, of the said The Norwalk

Gas and Electric Company, existing at the time of the delivery of this instrument, together with all its franchises, rights and privileges, are included in and covered by the conveyance hereby made.

And the party of the first party further agreees that it will, from time to time and at all times hereafter, as often as thereunto requested by the party of the second part, its successors or assigns, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law, for the better assuring unto the party of the second part, its successors and assigns, the property herein conveyed, or intended so to be, as by said party of the second part, its successors or assigns, shall be reasonably required.

In Witness Whereof, the corporations, parties hereto have caused their respective corporate names and seals to be hereunto affixed and the same to be attested by the signatures of their respective President and Secretary, the day and year first above written.

The Norwalk Gas and Electric Company,
By (Signed) Ed L. Young, President,
(Signed) J. A. Nester, Secretary.

(Corporate Seal)

Signed, sealed and delivered in presence of
(Signed) C. W. Collister,
(Signed) Owen N. Wilcox.

The Cleveland and South-Western Traction Company
By (Signed) A. E. Akins, President;
(Corporate Seal) E. F. Schneider, Secretary.

Signed, sealed and delivered in presence of
(Signed) C. W. Collister,
(Signed) Owen Wilcox.

The State of Ohio, Cuyahoga County, ss.

Personally appeared before me a Notary Public within and for said County, Ed L. Young, President, and J. A. Nester, Secretary, of the within named, The Norwalk Gas and Electric Company, and acknowledged the signing, sealing and execution of the within instrument to be their free act and deed as said President and Secretary, and the free and corporate act and deed of said The Norwalk Gas and Electric Company.

In Witness Whereof, I have hereunto set my hand and official seal, at Berea, Ohio, this 14th day of February, A. D. 1903.

(Signed) Owen N. Wilcox,
(Notarial Seal) Notary Public.

The State of Ohio, Cuyahoga County, ss.

Personally appeared before me a Notary Public within and for said County, A. E. Akins, President, and E. F. Schneider, Secretary of the within named, The Cleveland and South-Western Company, who acknowledged the signing, sealing and execution of the within instrument to be their free act and deed as such President and Secretary, and the free and corporate act and deed of said The Cleveland and South-Western Traction Company.

In Witness Whereof, I have hereunto set my hand and official seal, at Berea, Ohio, this 14th day of February, A. D. 1903.

(Signed) Owen N. Wilcox,
(Notarial Seal) Notary Public.

Pursuant to decree of foreclosure in the case of General Electric Company vs. The Cleveland, Southwestern & Columbus Railway Company, et al., No. 690 in Equity, in District Court of the United States in the Northern District of Ohio, Eastern Division, entered February 9, 1924, foreclosure sale held March 14, 1924, and an order of confirmation of said sale entered in said cause April 7, 1924, all right, title and interest of The Cleveland, Southwestern & Columbus Railway Company, its successors and assigns, in and to the rights and privileges of said The Cleveland, Southwestern & Columbus Railway Company evidenced by the within document, are hereby assigned, transferred and conveyed to The Cleveland, Southwestern Railway & Light Company as of March 1, 1924.

F. H. Wilson, Special Master.

PLAINTIFF'S EXHIBIT No. 12

O.K. as to form—E. F. B., H. C. L.

ORGANIZATION AND FRANCHISE
of
THE CLEVELAND SOUTHWESTERN AND COLUMBUS RAILWAY COMPANY

This Agreement of Consolidation, made and entered into on this 5th day of February, A. D. 1907, by and among The Cleveland and South-Western Traction Company, a corporation of the State of Ohio, and its Directors, party of the first part, and The Cleveland, Ashland and Mansfield Traction Company, a corporation of the State of Ohio, and its Directors, party of the second part, and The Ohio Central Traction Company, a corporation of the State of Ohio, and its Directors, party of the third part, each of said companies acting through and by the action and concurrence of their respective Boards of Directors.

Witnesseth, That Whereas, the laws of the State of Ohio provide, that whenever the lines, or authorized lines, of road of any street railroad corporations or companies meet or intersect, or can be conveniently operated from one power house, or from a power house or power houses, owned, under lease, or operated by one of such street railroad companies or corporations, or whenever any such line of any street railroad corporation or company and that of any railroad operated by electricity may be conveniently connected to be operated to mutual advantage, or whenever any such line of any street railroad corporation or company, or the railway of any company operated by electricity, can be conveniently operated from one power house, or from a power house owned, under lease, or operated by one of such street railroad corporations or companies, or by any company or corporation the railway of which is operated by electricity, such corporations or companies, or any two or more of them, are authorized to consolidate themselves into a single corporation, provided they are not competing lines; and

Whereas, The Cleveland and South-Western Traction Company now has and owns, authorized lines of street railway from a point in Lorain Street, in the City of Cleveland, Cuyahoga County, Ohio, to the following points, to-wit: a point in the Village of Rockport, in the County of Cuyahoga and State of Ohio; a point in the Village of Berea, in the County of Cuyahoga and State

of Ohio; a point in the City of Wooster, in the County of Wayne and State of Ohio; a point in the City of Elyria, in the County of Lorain and State of Ohio; a point in the Village of Grafton, in the County of Lorain and State of Ohio; a point in the Village of North Amherst, in the County of Lorain and State of Ohio; a point in the City of Lorain, in the County of Lorain and State of Ohio; a point in the Village of Wellington, in the County of Lorain and State of Ohio; a point in the Township of Norwalk, in the County of Huron and State of Ohio; all of said lines of street railway being within the Counties of Cuyahoga, Lorain, Erie, Huron, Medina, and Wayne in the State of Ohio; and

Whereas, The Cleveland, Ashland and Mansfield Traction Company now owns and has authorized lines of street railway from a point in the Northerly corporation line of the City of Mansfield, in the County of Richland and State of Ohio, to a point in the right of way and tracks of The Cleveland and South-Western Traction Company, in the County of Medina, State of Ohio, all of said lines being within the Counties of Richland, Ashland, Wayne and Medina, in the State of Ohio; and

Whereas, The Ohio Central Traction Company now owns and has authorized lines of Street railway from a point in the City of Bucyrus, in the County of Crawford, State of Ohio, to a point in the Northerly corporation line of the City of Mansfield in the County of Richland, State of Ohio; all of said lines being within the Counties of Crawford and Richland in the State of Ohio; and

Whereas, the lines of street railway of the corporations parties hereto meet and intersect and are operated by electricity and are not competing lines, and can be conveniently connected and operated to mutual advantage, and can be conveniently operated from power houses owned by one of said companies; and

Whereas, for the greater convenience of the public, and for the mutual advantage and benefit of the stockholders of each of said companies, the Directors of said companies have proposed, by and with the assent, approval and ratification of the stockholders of each of said companies, to be had in due form of law at meetings to be regularly called and held for that purpose, to unite and consolidate the capital stock, property and franchises of the said companies into one corporation;

Now, Therefore, The parties hereto, in conformity to the statute in such case made and provided, the said street railroad companies acting under and in pursuance of the resolution of their Board of Directors, and upon

the assent and ratification of the stockholders of said companies, to be had and made as hereinbefore set forth, do hereby agree to and with each other to, and do hereby unite and consolidate their said capital stock, railroads, property and franchises into one company, upon the following terms and conditions, to-wit:

First: The name of said consolidated company shall be The Cleveland, Southwestern and Columbus Railway Company.

Second: The officers of said company shall consist of a President, First Vice-President, Second Vice-President, Secretary and Treasurer, whose places of residence shall be in the State of Ohio.

Third: The number of Directors of said company shall be Nine (9) whose places of residence shall be in the State of Ohio, and the names and places of residence of the Directors of said Company, who are to hold office until their successors are elected by the stockholders, at the meeting appointed by the stockholders, called to take this agreement into consideration, pursuant to section 3383 of the Revised Statute of Ohio, are as follows:

E. T. Pomeroy, Cleveland, Ohio
F. E. Myers, Ashland, Ohio
H. Pomeroy, Cleveland, Ohio
F. L. Fuller, Cleveland, Ohio
M. J. Mandelbaum, Cleveland, Ohio
A. E. Akins, Cleveland, Ohio
H. Q. Sargent, Cleveland, Ohio
M. A. Sprague, Berea, Ohio
F. H. Ginn, Gates Mills, Ohio

Fourth: The names and residence of the officers of the Company who shall remain in office until their successors are elected by the Board of Directors, to be elected at the meeting of the stockholders appointed as mentioned in the paragraph last above of this agreement, and until their successors so elected are qualified, are as follows:

F. T. Pomeroy, President, Cleveland, Ohio
A. E. Akins, 1st Vice-President, Cleveland, Ohio
F. E. Myers, 2nd Vice-President, Ashland, Ohio.
E. F. Schneider, Secretary, Cleveland, Ohio
J. O. Wilson, Treasurer, Cleveland, Ohio.

Fifth: The principal office of the company shall be in the City of Cleveland, in the County of Cuyahoga and State of Ohio.

Sixth: The capital stock of the company which shall consist of common and preferred stock, shall be

Seven Million Five Hundred Thousand Dollars ($7,500,000.00) of common stock, divided into seventy-five thousand (75,000) shares of the par value of One Hundred Dollars ($100.00) each; and Two Million Five Hundred Thousand Dollars ($2,500,000.00) of preferred stock, divided into twenty-five thousand (25,000) shares of preferred stock of the par value of One Hundred Dollars each; and each share of the preferred stock of the Company, shall be entitled to dividends at the rate of five per centum per annum, payable semi-annually, out of the surplus profits each year, prior to the payment of any dividends upon the common stock, and such dividends upon the preferred stock shall be cumulative, and in case of the insolvency or dissolution of the corporation, the holders of the preferred stock shall be entitled to receive from the assets, remaining after paying its debts and liabilities, the full payment of the par value of such preferred stock, before anything is paid to the common stock, and the shares of common and preferred stock shall have equal voting power.

Seventh: Thirty-seven thousand (37,000) shares of the common stock and Twenty-four thousand (24,000) shares of the preferred stock shall be distributed in exchange for all the capital stock of The Cleveland and South-Western Traction Company, and of the Ohio Central Traction Company, as follows, to-wit:

To the holders of preferred stock of The Cleveland and South-Western Traction Company, twenty thousand (20,000) shares of said preferred stock and two thousand (2,000) shares of said common stock, in connection with two hundred (200) of the bonds of the Company, hereinafter provided for, all to be divided pro rata according to the holdings, among the preferred stockholders of said last named company.

To the holders of common stock of the Cleveland and South-Western Traction Company, Thirty thousand (30,000) shares of said common stock, to be divided pro rata according to the holdings, among the common stockholders of said last named Company.

To the holders of preferred stock of The Ohio Central Traction Company, four thousand (4,000) shares of said preferred stock, to be divided pro rata according to the holdings, among the preferred stockholders of said last named Company.

To the holders of common stock of The Ohio Central Traction Company, five thousand (5,000) shares of said common stock, to be divided pro rata according to the

holdings, among the common stockholders of said last named Company.

Eighth: To the holders of the stock of The Cleveland, Ashland and Mansfield Traction Company, ten thousand (10,000) shares of said common stock, to be divided pro rata, according to the holdings, among the stockholders of said last named company.

Ninth: The remaining one thousand (1000) shares of the preferred stock of the Cleveland, Southwestern and Columbus Railway Company, shall be disposed of by its Board of Directors, according to law, in such amounts and at such times and in such manner as the interests of the Company may require.

The remaining twenty-eight thousand (28,000) shares of the common stock of said company, shall be disposed of by the Board of Directors of said Company, according to law, in such amounts and at such times and in such manner as the interests of the company may require.

Tenth: The Cleveland, Southwestern and Columbus Railway Company assumes all the debts, liabilities, contracts and duties of each of said constituent companies.

Eleventh: The Cleveland, Southwestern and Columbus Railway Company shall, as herein provided, and the Board of Directors of said company is hereby authorized and empowered to, issue on behalf of said company, and in its corporate name, its bonds in the amount of Ten Million Dollars ($10,000,000.00), to be dated April 1st, 1907, payable twenty years after the date of said bonds, but redeemable, in the manner and for the sum to be provided in the trust deed or mortgage securing the same, ten years after the date thereof, or at any interest maturing period thereafter, at the option of said company. Said bonds to be of the denomination of One Thousand Dollars ($1000.00) each, to be payable in the gold coin of the United States of America of the present standard of weight and fineness, and to bear interest at the rate of Five per centum per annum, payable semi-annually, in the gold coin aforesaid: said interest to be evidenced by coupons attached to said bonds; said bonds to be secured by a mortgage or deed of trust, conveying to The Cleveland Trust Company, of Cleveland, Ohio, as trustee, by way of security for said bonds, all of the property and franchises of the Railway Company, now owned and hereafter to be acquired by it. No one of the bonds above mentioned shall be deemed issued or be valid or secured by the mortgage or deed of trust above provided for, until the same shall have been authenti-

cated by The Cleveland Trust Company, as Trustee, or its successor in the trust.

Of said bonds of The Cleveland, Southwestern and Columbus Railway Company, two hundred (200) shall be issued and used, together with twenty thousand (20,000) shares of the preferred stock of the company and two thousand (2,000) shares of the common stock of the company, in effecting the exchange of the holdings of preferred stock in the Cleveland and South-Western Traction Company, for the stock in this company, hereinbefore referred to.

Of said bonds of The Cleveland, Southwestern and Columbus Railway Company, three thousand one hundred and ten (3,110) shall remain in the hands of the trustee under said mortgage, for future issue, and shall be authenticated and issued only for the purposes of retiring the following issues of bonds, to-wit:

(a) Two Hundred and twenty bonds, of an authorized issue of bonds of The Norwalk Gas and Electric Company, of the aggregate amount of One Hundred and Twenty-five thousand dollars ($125,000.00); the total authorized issue of bonds last referred to, being a series of two hundred and fifty (250) bonds of the par value of five hundred dollars ($500.00) each, dated the first day of April, 1900, and secured by a mortgage or deed of trust, dated the first day of April, 1900, and given by The Norwalk Gas and Electric Company to The Euclid Avenue Trust and Savings Company, of Cleveland, Ohio, as Trustee; (thirty of said last mentioned bonds have never been issued and will not hereafter be issued); said two hundred and twenty bonds have been issued and are outstanding, and the payment of which said two hundred and twenty bonds, The Cleveland and South-Western Traction Company, its successors and assigns, is obligated to make, by the terms of the contract of sale, by The Norwalk Gas and Electric Company, to The Cleveland and South-Western Traction Company, dated February 14th, 1903, of all the gas and electric light plants and all other property, real, personal and mixed, and all the franchises, rights and privileges then owned by said The Norwalk Gas and Electric Company. The number of said bonds of this company to be used for the purposes of retiring said issue of bonds of The Norwalk Gas and Electric Company, is one hundred and ten (110).

(b) An issue of bonds of The Cleveland and South-Western Traction Company, of the par value of three million dollars ($3,000,000.00), said issue of bonds last referred to being a series of three thousand (3000) bonds

of the par value of one thousand dollars ($1,000.00) each, dated the 1st day of February, 1903, and secured by a mortgage or deed of trust, dated the 1st day of February, 1903, and given by The Cleveland and South-Western Traction Company, to The Federal Trust Company, of Cleveland, Ohio, as Trustee, of which said three thousand (3000) bonds of The Cleveland and South-Western Traction Company, last mentioned, fourteen hundred (1400) have been issued and are now outstanding; of which three thousand (3000) bonds of The Cleveland and South-Western Traction Company, last mentioned, sixteen hundred (1600) remain in the hands of the trustee for future issue, and are to be issued only for the purpose of retiring as soon as possible, an issue of bonds of The Elyria, Grafton and Southern Railway Company, now outstanding, of the par value of one hundred thousand dollars ($100,000.00), heretofore issued by said last named Company, dated the 1st day of January, 1902, which last mentioned issue of bonds was guaranteed by The Cleveland, Elyria and Western Railway Company, and are secured by a mortgage or deed of trust, dated January 1st, 1902, made by said The Elyria, Grafton and Southern Railway Company to The Federal Trust Company of Cleveland, Ohio, as Trustee; and for retiring as soon as possible an issue of bonds of The Cleveland, Elyria and Western Railway Company, of the par value of One Million Five Hundred Thousand Dollars ($1,500,000.00); said issue of bonds last mentioned being a series of fifteen hundred (1500) bonds of the par value of One Thousand Dollars ($1000.00) each, dated the 1st day of August, 1900, and secured by a mortgage or deed of trust, dated the 1st day of August, 1900, and given by The Cleveland, Elyria and Western Railway Company to The Western Reserve Trust Company of Cleveland, Ohio, as Trustee; of which fifteen hundred (1500) bonds of The Cleveland, Elyria and Western Railway Company, last mentioned, one thousand (1000) have been issued and sold and are now outstanding, and seventy-three (73) of which have been issued and used to retire seventy-three (73) of an issue of one thousand dollar bonds of The Cleveland, Berea, Elyria and Oberlin Railway Company, hereinafter mentioned, and are now outstanding; and of which bonds of The Cleveland, Elyria and Western Railway Company four hundred and twenty-seven (427) remain in the hands of the Trustee for future issue, and are to be issued only for the purpose of retiring as soon as possible four hundred and twenty-seven (427) out of a total issue of five hundred (500)

bonds of The Cleveland, Berea, Elyria and Oberlin Railway Company, of the par value of Five Hundred Thousand Dollars ($500,000.00); said issue of bonds of The Cleveland, Berea, Elyria and Oberlin Railway Company last mentioned, being a series of five hundred (500) bonds of the par value of One thousand dollars ($1000.00) each, dated March 1st, 1899, secured by a mortgage or deed of trust, and given by The Cleveland, Berea, Elyria and Oberlin Railway Company, to The Cleveland Trust Company of Cleveland, Ohio, as Trustee; of which said five hundred (500) bonds last mentioned, seventy-three (73) have been retired; One hundred and Twenty-seven (127) have been issued and sold and are now outstanding, and three hundred (300) of which are issued and deposited with The Cleveland Trust Company of Cleveland, Ohio, to be held by it in escrow and used for the purpose of redeeming the following issues of bonds, viz.:

(1) An issue of four hundred bonds of The Cleveland and Elyria Electric Railroad Company of the par value of Five Hundred Dollars ($500.00) each, dated May 1st, 1895, and secured by a mortgage or deed of trust, dated May 1st, 1895, given by said The Cleveland and Elyria Electric Railroad Company to The Savings and Trust Company of Cleveland, Ohio.

(2) An issue of Two hundred bonds of The Elyria and Oberlin Electric Railway Company, of the par value of five hundred dollars ($500.00) each, dated August 1st, 1897, and secured by a mortgage or deed of trust, dated August 1st, 1897, given by the said The Elyria and Oberlin Electric Railway Company to The Cleveland Trust Company of Cleveland, Ohio.

Of said bonds of The Cleveland, Southwestern and Columbus Railway Company, four hundred (400) shall remain in the hands of the Trustee under said mortgage, for future issue, and shall be authenticated and issued only for the purpose of retiring as soon as possible, an issue of bonds of The Ohio Central Traction Company, (a corporation formed by the consolidation of two constituent companies, named The Ohio Central Traction Company and The Mansfield, Crestline and Galion Railway Company) of the par value of four Hundred thousand dollars ($400,000.00), said issue of bonds last referred to being a series of eight hundred (800) bonds of the par value of five hundred dollars ($500.00) each, dated the 2nd day of March, 1903, and secured by a mortgage or deed of trust dated the 2nd day of March, 1903, and given by said The Ohio Central Traction Company,

the consolidated company, to The Cleveland Trust Company of Cleveland, Ohio, as Trustee; of which said eight hundred bonds, five hundred (500) have been issued, and used to retire an issue of five hundred bonds of said The Mansfield, Crestline and Galion Railway Company, of the par value of Two Hundred and Fifty Thousand Dollars ($250,000.00), dated February 2nd, 1903, and secured by a mortgage or deed of trust made by The Mansfield, Crestline and Galion Railway Company, to The Cleveland Trust Company, of Cleveland, Ohio, as Trustee, and are now outstanding; of which said eight hundred bonds, three hundred (300) are in the hands of the Trustee for future issue and are to be authenticated and issued only for the purpose of retiring as soon as possible, one hundred and fifty (150) bonds out of a total issue of two hundred (200) bonds, of the par value of one thousand dollars ($1000.00) each, (fifty of which bonds have heretofore been cancelled and retired) of the said constituent company, The Ohio Central Traction Company, dated June 1st, 1899, and secured by a mortgage or deed of trust, made by said constituent company, The Ohio Central Traction Company, to The New Haven Trust Company, of New Haven, Connecticut, as Trustee.

Of said bonds of The Cleveland, Southwestern and Columbus Railway Company, one thousand (1000) shall be issued, and used for the purpose of making full satisfaction, on the part of said The Cleveland, Ashland and Mansfield Traction Company, to the persons, firms and corporations who have agreed to purchase the first mortgage bonds of said last named Company, and to whom the said last named Company is under agreement and obligation to deliver such bonds; the aggregate amount of which bonds so agreed to be purchased and delivered is in the sum of One Million Dollars ($1,000,000.00). Of said bonds of The Cleveland, Southwestern and Columbus Railway Company, two hundred and ninety (290) shall be issued at once, and delivered to the company and sold, or otherwise used, for the purpose of the payment of the floating debts and liabilities of the constituent companies, which are assumed by The Cleveland Southwestern and Columbus Railway Company; for the purpose of purchasing necessary equipment for the lines of the consolidated company; for the purpose of making necessary improvements of the lines of the Consolidated companies; and for any other lawful purpose and purposes.

The remaining five thousand (5000) bonds of The Cleveland, Southwestern and Columbus Railway Company, shall be issued from time to time, upon resolutions of the Directors of the company, adopted at any regular or special meeting of the Directors, and sold or otherwise used for the purpose of making necessary extensions, improvements, equipments and additional equipments of the lines of the consolidated company, and extensions thereof, and the acquisition, equipment and additional equipment of other lines of railway and extensions thereof, and for such other lawful purpose or purposes as shall be found advisable by the Board of Directors of the consolidated company.

Twelfth: All the affairs, property and business of the said The Cleveland, Southwestern and Columbus Railway Company shall be under the control of the Board of Directors of said company, who shall have full power in the management and control of the business of the company, subject to the laws of the State of Ohio.

Thirteenth: The said The Cleveland and South-Western Traction Company, party of the first part, and The Cleveland, Ashland and Mansfield Traction Company, party of the second part, and the Ohio Central Traction Company, party of the third part, hereby respectively grant, convey, transfer and set over to the consolidated The Cleveland, Southwestern and Columbus Railway Company, all their respective rights, franchises, and property of every description whatsoever, and hereby respectively transfer to said The Cleveland, Southwestern and Columbus Railway Company, their respective books, papers, furniture and assets of every description whatsoever; it being especially understood and agreed, that when this consolidation agreement has been consented to and ratified by the stockholders of each of said Companies, in accordance with law, this agreement shall constitute a conveyance to the consolidated company, The Cleveland, Southwestern and Columbus Railway Company, of all the rights, property, franchises, privileges, books, papers and assets of every description of the three constituent companies signing this agreement.

In Witness Whereof, each of the above named constituent companies and the Directors of said companies as well, parties hereto, have caused these presents to be signed by said Directors, and by the President and Secretary of each of said companies, and have caused their

respective corporate seals to be hereto affixed, the day and year first above written.

The Cleveland and South-Western Traction Company
By F. L. Pomeroy, President
E. F. Schneider, Secretary
F. L. Pomeroy
H. Pomeroy
H. L. Sargent
A. E. Okins
M. A. Sprague
F. L. Fuller
Frank H. Ginn
W. B. Thompson
F. E. Myers
W. H. Lamprecht
L. M. Coe
A. C. Smith
Geo. N. Chandler,
Directors of The Cleveland and South-Western Traction Company.

The Cleveland, Ashland and Mansfield Traction Company
By C. W. Collister, President
A. J. Halle, Secretary.
C. W. Collister
Frank Butler
A. J. Halle
M. L. Benham
W. H. Abbott
A. F. Schneider
A. B. Taylor
Directors of The Cleveland, Ashland and Mansfield Traction Company

The Ohio Central Traction Company
By L. J. Wolf, President
L. M. Wolf, Secretary
L. J. Wolf
P. D. Carpenter
Adolph Born
A. E. Feihl
L. M. Wolf
(Seal) L. M. Coe,
Directors of The Ohio Central Traction Company.

The State of Ohio, Cuyahoga County, ss.

I, E. F. Schneider, Secretary of The Cleveland and South-Western Traction Company, do hereby certify that a meeting of the stockholders of said company was held at the office of the company, in the Village of Berea, Ohio, on the 28th day of February, A. D. 1907, for the purpose of considering the within agreement of consolidation.

I do further certify that due notice as required by law of the time and place of holding said meeting, and the objects thereof, had been previously given to each of the persons in whose names the capital stock of the company then stood and now stand on the books thereof.

I do certify that the persons in whose names 46940 shares of the capital stock of the company then stood and now stand on the books of the company, all being stockholders of said Company, were present at said meeting in person or by proxy.

I do further certify that the within agreement of consolidation was submitted for the consideration of said meeting and a vote by ballot was taken for the adoption or rejection of the same. That 46940 shares of the stock of said company (all of which was and is fully paid up and upon none of the shares of which were there any unpaid installments called for by the Board of Directors) were voted in person or by proxy, by the stockholders entitled to vote the same; one vote being cast for each share of stock by the holder thereof, and that said agreement was adopted by 46940 shares of the stock of said company cast in favor of said adoption and no shares being cast in favor of said rejection, the vote cast in favor of the adoption of said agreement being more than two-thirds of the capital stock subscribed of the company.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said company, this 28th day of February, A. D. 1907.

E. F. Schneider
Secretary of The Cleveland and South-Western Traction Company

The State of Ohio, Cuyahoga County, ss.

I, A. J. Halle, Secretary of The Cleveland Ashland and Mansfield Traction Company, do hereby certify that a meeting of the stockholders of said company was held at the office of the company, 615 Garfield Building, Cleveland, Ohio, on the 28th day of February, A. D. 1907, for the purpose of considering the within agreement of con-

solidation. I do further certify that all notice required by law or otherwise, of the time and place of holding said meeting and the objects thereof, were duly waived in writing by all the persons in whose names the capital stock of the company then stood and now stands on the books thereof.

I do certify that the persons in whose names ten shares of the capital stock of the company then stood and now stands on the books of the company, and being all the stockholders of said company, were present at said meeting in person or by proxy.

I do further certify that the within agreement of consolidation was submitted for the consideration of said meeting and a vote by ballot was taken for the adoption or rejection of the same; that ten shares of the stock of the company, (all of which was and is fully paid up and upon none of the shares of which were there any unpaid installments called for by the Board of Directors) were voted in person or by proxy by the stockholders entitled to vote the same; one vote being cast for each share of stock by the holder thereof, and that said agreement was adopted by ten shares of the stock of said company cast in favor of said adoption and no shares being cast in favor of said rejection, the vote cast in favor of the adoption of said agreement being all the capital stock subscribed of the company.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said company, this 28th day of February, A. D. 1907.

A. J. Halle,
Secretary of The Cleveland, Ashland and Mansfield Traction Company
(Seal)

The State of Ohio, Crawford County, ss.

I, L. M. Wolf, Secretary of The Ohio Central Traction Company, do hereby certify that a meeting of the stockholders of said company was held at the office of the company, in the City of Galion, Ohio, on the 1st day of March, A. D. 1907, for the purpose of considering the within agreement of consolidation. I do further certify that due notitce as required by law, of the time and place of holding said meeting, and the objects thereof, had been previously given to each of the persons in whose names the capital stock of the company then stood and now stands on the books thereof.

I do certify that the persons in whose names 10442 3/18 shares of the capital stock of the company then stood and now stands on the books of the company,

all being stockholders of said company, were present at said meeting in person or by proxy. I do further certify that the within agreement of consolidation was submitted for the consideration of said meeting and a vote by ballot was taken for the adoption or rejection of the same. That 10442 3/18 shares of the stock of said company (all of which was and is fully paid up and upon none of the shares of which were there any unpaid installments called for by the Board of Directors) were voted in person or by proxy, by the stockholders entitled to vote the same; one vote being cast for each share of stock by the holder thereof; and that said agreement was adopted by 10442 3/18 shares of the stock of said company cast in favor of said adoption and no shares being cast in favor of said rejection, the vote cast in favor of the adoption of said agreement being more than two-thirds of the capital stock subscribed of the company.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said company, this 1st day of March, A. D. 1907.

L. M. Wolf,
Secretary of The Ohio Central Traction Company.

(Seal)

United States of America, State of Ohio,
Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Agreement of Consolidation between The Cleveland and South-Western Traction Company, and The Cleveland, Ashland and Mansfield Traction Company and The Ohio Central Traction Company into The Cleveland, Southwestern and Columbus Railway Company filed in this office on the 4th day of March, A. D. 1907, and recorded in Volume 120, Page 684, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 14th day of January, A. D. 1930.

(Signed) Clarence J. Brown,
Secretary of State.

(Seal)

PLAINTIFF'S EXHIBIT No. 13

O.K. as to form—E. F. B., H. C. L.

THESE ARTICLES OF INCORPORATION
of
THE CLEVELAND SOUTHWESTERN RAILWAY & LIGHT COMPANY

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Cleveland Southwestern Railway & Light Company.

Second. Said corporation is to be located at Cleveland in Cuyahoga County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of constructing, building, acquiring by purchase, lease or otherwise, and owning, maintaining and operating a line or lines of interurban and street railroad, with rights of way, roadbed, single or double tracks, side tracks, switches, spurs, turn-outs, branches, extensions, stations, depots, terminals, way-stations, freight houses, power houses, lines for the transmission of electric power, and all other necessary or convenient appurtenances and appliances incidental to the operation of such railroad; said railroad to be operated by electric or other power, except steam power; of acquiring and holding real estate and personal property and all equipment and accessories necessary, convenient or proper to carry out the purposes herein mentioned; of purchasing, leasing or otherwise acquiring electricity or other motive power, and of constructing, owning and operating power plants for the generation of electricity or other motive power, by steam, water or other motive power, and of using, supplying and selling electricity or other motive power so generated for heat, light, power or other purposes and receiving compensation therefor; of transporting passengers, packages, express matter, United States mail, baggage, freight, and engaging in the general business of a common carrier upon its railroad or lines of railway and electrical transmission lines; also for the purpose of acquiring by leave, purchase or otherwise, owning and operating a bus or bus lines in connection with or as extensions or additions to its said lines of street and interurban railroad upon, in, over and along the streets, highways and roads in connection therewith,

such operation to be incidental or appurtenant to its business of operating such street and interurban railroad.

Said railroad and electrical transmission lines to have the City of Cleveland, Cuyahoga County, Ohio, for one terminus and the City of Norwalk, Huron County, Ohio, and the City of Bucyrus, Crawford County, Ohio, for its other termini, and shall pass through the following named counties in the State of Ohio, to-wit: Huron, Lorain, Cuyahoga, Medina, Wayne, Ashland, Richland and Crawford, and with branches of said railroad and electrical transmission lines to towns or places within the limits of said counties.

Fourth. The capital stock of said corporation shall be Ten Thousand Dollars ($10,000.00) divided into one hundred (100) shares of common stock of the par value of One Hundred Dollars ($100.00) each.

In Witness Whereof, we have hereunto set our hands, this 7th day of March, A. D. 1924.

Gardner Abbott
Henry A. Marting
J. C. Little
John M. Garfield
John S. Fleek

The State of Ohio, County of Cuyahoga, ss.

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 7th day of March, A. D. 1924, the above named Gardner Abbott, Henry A. Marting, J. C. Little, John M. Garfield and John S. Fleek who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

Joseph B. Marsh
(Seal) Notary Public.

The State of Ohio, County of Cuyahoga, ss.

I, George Wallace, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Joseph B. Marsh whose name is subscribed to the foregoing acknowledgment as a Notary Public was at the date thereof a Notary Public, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Cleveland, Ohio, this 7th day of March, A. D. 1924.

George Wallace

(Seal) By J. A. Baker, Deputy Clerk

United States of America, State of Ohio,
Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the

Articles of Incorporation

The Cleveland Southwestern Railway & Light Company filed in this office on the 8th day of March, A. D. 1924 and recorded in Volume 305, Page 648, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 14th day of January, A. D. 1930.

(Signed) Clarence J. Brown

(Seal) Secretary of State.

PLAINTIFF'S EXHIBIT No. 14

O. K. as to form—E. F. B., H. C. L.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 3394:

Joint Application of Victor Emanuel and The Cleveland Southwestern Railway and Light Company for authority to purchase and sell certain high tension electric lines and the property and equipment in connection therewith in and between the Village of Oberlin and the City of Norwalk, Ohio

Now comes Victor Emanuel, a resident of the State of New York and The Cleveland Southwestern Railway

and Light Company, an Electric Railroad Corporation, incorporated under the laws of the State of Ohio and represent that they have entered into a contract and agreement for the purchase by said Victor Emanuel and the sale by The Cleveland Southwestern Railway and Light Company, subject to the approval of the Public Utilities Commission of Ohio, of certain high tension electric lines and the property and equipment in connection therewith as more particularly described in an Agreement dated November 19, 1924, upon the terms and conditions as more particularly set forth in said Agreement. A copy of said Agreement is attached hereto made a part hereof and marked Exhibit "A"

That the property therein contracted to be sold by The Cleveland Southwestern Railway and Light Company is reasonably worth the price to be paid therefor by Victor Emanuel, the purchaser thereof, as stipulated in said Agreement.

Wherefore, your Petitioners pray for the consent and authority of the Public Utilities Commission to complete said Agreement of purchase and sale upon the terms therein stipulated, and acknowledge and deliver such Bills of Sale or other instruments as may be necessary to transfer title to such property, and for such other orders and directions in the premises as may be reasonable and necessary.

Victor Emanuel
The Cleveland Southwestern Railway
and Light Company
F. H. Wilson, President
Attest: C. J. Mayers, Secretary.

State of New York, County of New York, ss:

Victor Emanuel being first duly sworn, says that the allegation, statements and averments contained in the foregoing Application are true as he verily believes.

Victor Emanuel

Sworn to before me and subscribed in my presence by said Victor Emanuel, this 11th day of December, 1924.

Mae B. Coy,
Notary Public.

State of Ohio, Cuyahoga County, ss:

F. H. Wilson, being first duly sworn, says that he is the President of The Cleveland Southwestern Railway and Light Company, and that the allegations, statements and averments contained in the foregoing application are true as he verily believes.

F. H. Wilson.

Sworn to and subscribed in my presence by said F. H. Wilson this 15th day of December, 1924.

Gardner Abbott,
Notary Public.

State of Ohio, Cuyahoga County, ss.

C. J. Mayers being first duly sworn, says that he is the Secretary of The Cleveland Southwestern Railway and Light Company, and that the allegations, statements and averments contained in the foregoing Application are true as he verily believes.

C. J. Mayers

Sworn to before me and subscribed in my presence by said C. J. Mayers, this 15th day of December, 1924.

Gardner Abbott,
Notary Public.

CERTIFICATION

State of Ohio, County of Franklin, ss:

I, Ira E. Sprankle, the duly appointed, qualified and acting Superintendent of Investigation, in whose custody the books, papers, documents and records of said Commission are filed, do hereby Certify there is transmitted herewith a true and correct copy of the application filed in Proceeding No. 3394; being

In the matter of the joint application of Victor Emanuel and The Cleveland Southwestern Railway and Light Company for authority to purchase and sell certain high tension electric lines and the property and equipment in connection therewith in and between the Village of Oberlin and the City of Norwalk, Ohio.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of The Public Utilities Commission of Ohio at Columbus, Ohio, this thirteenth day of January, A. D. 1930.

Ira E. Sprankle
Superintendent of Investigation,
The Public Utilities Commission of Ohio.

PLAINTIFF'S EXHIBIT No. 14-A

O.K. as to form—E. F. B., H. C. L.

"No. 3394

"EXHIBIT A"

AGREEMENT

Excerpt:

I.

The Southwestern Company covenants and agrees to sell, assign and transfer to the Purchaser, its three phase high tension lines, poles and equipment therefor between the power house and substation of the Southwestern Company in the City of Norwalk, Ohio, and said point of intersection of the Elyria-Oberlin Road and East Lorain Street in the Village of Oberlin extended, east of Oberlin, referred to as the point of railroad and high tension line intersection, including the pole line to the Oberlin water works and the substation in connection therewith.

Also, all distribution power and light systems with the equipment in connection therewith, owned by the Southwestern Company within the corporate limits of the City of Norwalk, Ohio; together with all contract or franchise or other rights and privileges which the Southwestern Company may have in connection with the conduct of an electric light, heat and power business in said City;"

CERTIFICATION

State of Ohio, County of Franklin, ss:

I, Ira E. Sprankle, the duly appointed qualified and acting Superintendent of Investigation, in whose custody the books, papers, documents and records of the said The Public Utilities Commission of Ohio are filed, do hereby Certify there is transmitted herewith a true and correct copy of an Excerpt from Exhibit "A" in Proceeding No. 3394, being

In the matter of the joint application of Victor Emanuel and The Cleveland Southwestern Railway and Light Company for authority to purchase and sell certain high tension electric lines and the property and equipment in and between the Village of Oberlin and the City of Norwalk, Ohio.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of The Public Utilities Com-

mission of Ohio at Columbus, Ohio, this thirteenth day of January, A. D. 1930.

Ira E. Sprankle
Superintendent of Investigation
The Public Utilities Commission of Ohio.

PLAINTIFF'S EXHIBIT No. 15

O.K. as to form—E. F. B., H. C. L.

Before
THE PUBLIC UTILITIES COMMISSION OF OHIO
No. 3394.

In the matter of the joint application of Victor Emanuel and The Cleveland Southwestern Railway and Light Company for authority to purchase and sell certain high tension electric lines and the property and equipment in connection therewith in and between the Village of Oberlin and the City of Norwalk, Ohio.

This day, after due notice to all parties in interest and it appearing to the Commission from the verified allegations in said application and the sworn statements and exhibits filed in connection therewith, and other documentary evidence submitted, that the taking of oral testimony herein is unnecessary, this matter came on for consideration upon the joint application of The Cleveland Southwestern Railway and Light Company and Mr. Victor Emanuel, of New York, New York, asking the consent to and approval, by this Commission, of the sale by said first named applicant and the purchase by the latter of the high tension electric lines and property and equipment associated therewith situated and being in and between the Village of Oberlin and the City of Norwalk, Ohio, of said The Cleveland Southwestern Railway and Light Company.

The Commission, being fully advised in the premises, finds from the pleadings and exhibits filed herein and its independent inquiry and investigation thereupon:

That the public will, upon the consummation of said proposed sale and purchase of said property, be furnished adequate service for a reasonable and just rate, rental, toll or charge the therefor,

and is satisfied that consent and authority for sale and purchase of such property should be granted. It is, therefore,

Ordered, That said The Cleveland Southwestern Railway and Light Company be, and hereby it is authorized to sell to Mr. Victor Emanuel of New York, New York, the high tension electric lines and property and equipment associated therewith, in and between the Village of Oberlin and the City of Norwalk, Ohio, which said property is more particularly described in the copy of the contract for the purchase and sale thereof appended to the application herein and marked, for identification Exhibit "A"; and the said Victor Emanuel hereby is authorized to purchase and acquire the same. It is further

Ordered, That, forthwith upon the exercise of the authority herein granted, the said parties file with this Commission schedules providing for their respective withdrawal from an inauguration of service within the territory now served by means of said property. It is further

Ordered, That nothing herein shall be construed to be a consent to or approval by this Commission of any increase in rates or diminution of service within the territory now served by means of said property; nor shall the findings hereinbefore set forth as to rates and service be binding upon this Commission in any future proceedings involving rates and/or service.

The Public Utilities Commission of Ohio.
Charles C. Marshall, Chairman.
George T. Poor,
Frank B. Maullar,
Commissioners.

Dated at Columbus, Ohio,
This sixth day of January, 1925.

CERTIFICATION

State of Ohio, County of Franklin, ss.

I, Ira E. Sprankle, the duly appointed, qualified and acting Superintendent of Investigation, in whose custody the books, papers, documents and records of said The Public Utilities Commission of Ohio are filed, do hereby Certify there is transmitted herewith a true and correct copy of the order of said Commission in Proceeding No. 3394; being

In the matter of the joint application of Victor Emanuel and The Cleveland Southwestern Railway and Light Company for authority to purchase and sell certain high tension electric lines and the property and equipment in connection therewith in and between the Village of Oberlin and the City of Norwalk, Ohio.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the Public Utilities Commission of Ohio at Columbus, Ohio, this thirteenth day of January, A. D. 1930.

Ira E. Sprankle (Signed)
Superintendent of Investigation The Public Utilities Commission of Ohio.

PLAINTIFF'S EXHIBIT No. 16

O.K. as to form—E. F. B., H. C. L.

BILL OF SALE

The Cleveland Southwestern Railway and Light Company, Grantor,

Victor Emanuel, Grantee.

Know All Men By These Presents, That The Cleveland Southwestern Railway and Light Company, an Ohio Corporation, the Grantor, in consideration of the sum of

Ten Dollars ($10.00) and other good and valuable considerations, received to its full satisfaction of Victor Emanuel, the Grantee, does hereby grant, convey, assign, transfer and deliver up to said Victor Emanuel, his administrators, executors or assigns, all and singular, the following described property, to-wit:

(a) That certain three phase high tension line, poles and equipment therefor between the power house and sub-station in the City of Norwalk of the Grantor and the point of intersection of the Elyria-Oberlin Road, and East Lorain Street in the Village of Oberlin extended, east of Oberlin.

(b) That certain three phase high tension line, poles and equipment therefor, extending from the high tension line hereinbefore described in Paragraph (a) hereof, to the Oberlin Water Works in the Village of Oberlin, together also with all sub-station equipment in connection therewith of the Grantor in the City of Oberlin, said equipment including all articles of personal property and all appurtenances in and to said high tension line mentioned in this paragraph.

(c) All primary and secondary light lines of the Grantor located on the poles referred to in Paragraphs (a) and (b) hereof and/or used in connection with the power and light business of the Grantor, including (1) approximately 3.9 miles of line between the city limits of the City of Norwalk and Stop 35 upon the Electric Interurban Railroad of the Grantor and (2) Line from point of connection with said high tension line described in Paragraph (a) hereof to and in the Village of Kipton, Ohio, and including all distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto, or used in connection therewith of the Grantor, within said Village of Kipton.

(d) All distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the Grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines and poles of the Grantor, approximately 5.2 miles of lines on poles of others than the Grantor and approximately 4.3 miles of lines on poles owned jointly by the Grantor and others, together with all right, title and interest of the Grantor in and to the poles so occupied jointly.

(e) All equipment, material, appurtenances of the Grantor in and to the Power House and Sub-station of the Grantor in the City of Norwalk, Ohio, including boil-

ers, engines, frequency changer, transformers, oil switches, metering equipment, rotary converter.

Also all switching equipment, transformers, appurtenances and other equipment in connection with said three phase high tension line mentioned in Paragraph (a) hereof and located in the Railroad Station of the Grantor in the Village of Birmingham, Ohio, and used in connection with the commercial power and light business of the Grantor.

(f) That certain three phase high tension wire, cross arms, pins and insulators between the point of intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin extended, east of Oberlin (referred to in Paragraph (a)) and the point on the right of way of the Electric Interurban Railway of the Grantor where the Polk High Tension Line of the Grantor so-called, intersects said railway right of way and the pole line in connection therewith at Stop 100 on said right of way, more commonly known as Wack's Cheese Factory.

(g) That certain three phase high tension wire, pins and insulators located on the north side of poles of the Grantor between said Stop 100 referred to in Paragraph (f) hereof and the west property line of the car shops of the Grantor in the City of Elyria, Ohio.

It being the intention of the Grantor to assign, transfer, convey and deliver unto the Grantee, all personal property, equipment and appurtenances used by the Grantor in the conduct of its business of furnishing and supplying electrical energy for heat, light and power between said point of intersection of the Elyria-Oberlin Road and East Lorain Street in the Village of Oberlin extended, east of Oberlin, and the Power House and Sub-station of the Grantor in the City of Norwalk, or useful in the conduct of said business; excepting however therefrom the trolley wires, feeder wires, telephone wires, cross arms and attachments in connection therewith, belonging to the Grantor upon the poles supporting said high tension line between said City of Norwalk and point of intersection east of Oberlin.

To Have and To Hold the same unto said Grantee, his administrators, executors or assigns forever. And the said Grantor hereby covenants to and with the said Grantee that said Grantor is the lawful owner of the above described goods and chattels; that the Grantor has good right and authority to sell the same as aforesaid, and that said Grantor will warrant and defend the same against all lawful claims and demands whatsoever.

In Witness Whereof, The Cleveland Southwestern Railway and Light Company has hereunto set its hand and seal by its president and secretary at Cleveland, Ohio, as of the 31st day of December, 1924.

The Cleveland Southwestern Railway and Light Company,

(Signed) F. H. Wilson, President

(Signed) C. J. Mayers, Secretary

Signed in the presence of:

(Signed) C. M. McHisson

(Signed) L. M. Miller

PLAINTIFF'S EXHIBIT No. 17

O.K. as to form—E. F. B., H. C. L.

Assignment and Release by The Cleveland Southwestern Railway and Light Company to Victor Emanuel. Dated Dec. 31, 1924.

Know All Men by These Presents: That The Cleveland Southwestern Railway and Light Company, a corporation, incorporated under the laws of the State of Ohio, the Grantor, in consideration of the sum of Ten Dollars ($10) and other good and valuable considerations received to its full satisfaction of Victor Emanuel, the Grantee, has given, granted, remised, released and forever quit-claimed, and does by these presents absolutly give, grant, remise, release, and forever quit-claim unto the said Grantee, his heirs and assigns forever, all such rights and title as it, the said Grantor, has or ought to have in and to the following described premises:

That certain right of way upon which to erect and maintain poles for the purpose of carrying electric, feed and other wires, commencing in the County of Lorain, State of Ohio, Township of Russia at or near the intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin extended, east of Ober-

lin; thence in a westerly direction through said township of Russia, County of Lorain; thence northwesterly through the Township of Henrietta in said County, to the Village of Birmingham, Florence Township, Erie County, State of Ohio; thence westerly through said Florence Township and Berlin Township of said Erie County to the Village of Berlin Heights in said Township; thence southwesterly through said Township and through the Township of Milan in said County; thence southwesterly through the Township of Norwalk, Huron County, State of Ohio to the easterly limits of the City of Norwalk, Huron County, State of Ohio; thence over and across streets and ways in the City of Norwalk to the Sub-station and Power House of the Grantor in said City;

Said right of way for the maintenance of the pole line as aforesaid and as herein granted, being all the right, title and interest of the Grantor in and to its right of way or easement for the construction and maintenance of the pole line now owned by the Grantor, and extending between the points hereinbefore set forth and having been acquired by the Grantor or its predecessors in title by grant of easement, appropriation proceedings, contract, license and franchise, which grant of easement, appropriation proceedings, contract, license and franchise are in part as follows, to-wit:

(List of 158 right of way deeds and contracts is omitted—see Physical Exhibit 17.)

(a) Contract dated November 1, 1920 between The Wheeling & Lake Erie Railway Company and The Cleveland Southwestern & Columbus Railway Company in respect to right of crossing the right of way and tracks of The Wheeling & Lake Erie Railway Company with a high transmission line.

(b) Agreement by and between The Norwalk and Huron County Telephone Company of Norwalk, Ohio, and The Norwalk Gas & Electric Company dated July 23, 1902, with respect to the joint use of pole line in the City of Norwalk, O.

(c) Contract dated December 30, 1922, between The New York Central Railroad Company and F. H. Wilson, Receiver of The Cleveland Southwestern & Columbus Railway Company in respect to crossing the right of way and track of said The New York Central Railroad Company.

(d) Facility License by and between Receivers of The Central Union Telephone Co. and The Cleveland Southwestern & Columbus Railway Co. dated February

11, 1919, with respect to joint use of poles in the City of Norwalk, O.

(e) Agreement between The Central Union Telephone Company and The Cleveland Southwestern & Columbus Railway Company dated November 20, 1919, with respect to joint use of poles in the City of Norwalk, Ohio.

Said right of way hereinbefore described being so much of the railroad right of way and other lands of the Grantor hereinbefore described as may be necessary to construct, maintain and operate said pole line as aforesaid.

Together with all right, title and interest of the Grantor in and to said right of way for the maintenance of a pole line as aforesaid between said point of intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin, Ohio, extended, east of Oberlin and the Sub-station and power house of the Grantor in the City of Norwalk, Huron County, Ohio, whether acquired by deed, grant of easement, franchise, license, contract or otherwise, and whether specifically set forth and described or referred to herein, or not so set forth;

Together also with all right, title and interest of the Grantor in and to any rights of way for a pole line, pole line rights, pole lines, poles and any licenses, franchises, easements or grants for said purposes, possessed or enjoyed by the Grantor in the City of Norwalk, Ohio, and/or used in connection with the distribution of power, light and heat by the Grantor in said city;

Together also with all right, title and interest of the Grantor for the maintenance of a pole line and to any easement, grant, privilege, franchise or license for the maintenance or construction of pole lines or poles and the privileges in connection therewith in the Village of Oberlin, extending from the high tension line of the Grantor in the Village of Oberlin to the Oberlin Water Works and the Sub-station property in connection therewith.

It being the intent of the Grantor by this conveyance, to convey to said Grantee any and all rights of the Grantor in connection with the maintenance of a pole line hereinbefore described from the intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin, Ohio, extended, east of Oberlin to the Sub-Station and Power House of the Grantor in the City of Norwalk, Huron County, Ohio, including therein any easements, franchises, licenses, contracts, privileges and any rights and interests of the grantor in connection with

said pole line in the Village of Oberlin, in said City of Norwalk and in and to said pole line between said points hereinbefore set forth and in and to any tributary lines extending from or to said pole line between the points aforesaid.

Said franchises, deeds, grants, easements, licenses and other rights and privileges of the Grantor having been acquired by the Grantor by deed of F. H. Wilson, Special Master, dated April 30, 1924, in pursuance of foreclosure sale held March 14, 1924, under the provisions of Decree of Foreclosure in the case of The General Electric Company vs. The Cleveland Southwestern & Columbus Railway Company, et al., being No. 690 in equity in the District Court of the United States for the Northern District of Ohio, Eastern Division; which Decree of Foreclosure, the order of confirmation of said sale at foreclosure and the deed of F. H. Wilson, Special Master, delivered in pursuance thereof are of record in the several counties in which the several deeds, grants, easements, licenses and other rights and privileges herein conveyed are situated.

To Have and To Hold the premises aforesaid, with the appurtenances thereunto belonging, to the said Grantee, his heirs and assigns, so that neither the said Grantor, nor its successors or assigns, nor any other persons claiming title through or under it, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.

In Witness Whereof, said corporation sets its hand and corporate seal by F. H. Wilson, its President and C. J. Mayers, its Secretary, this 31st day of December, 1924.

The Cleveland Southwestern Railway and Light Company,
By F. H. Wilson, President.
By C. J. Mayers, Secretary.

Signed in the presence of: (Corporate Seal)
C. E. McNisson,
L. M. Miller.

State of Ohio, Cuyahoga County, ss.

Before me, a Notary Public in and for said County, personally appeared the above named F. H. Wilson and C. J. Mayers, President and Secretary respectively of The Cleveland Southwestern Railway and Light Company, who acknowledge that they did sign the foregoing instrument and that the same is the free act and deed of

said corporation and the free act and deed of each of them personally and as such officers.

In Testimony Whereof I have hereunto set my hand and official seal at Cleveland, this 31st day of December, 1924.

Gardner Abbott,
Notary Public.

(Notarial Seal)

PLAINTIFF'S EXHIBIT No. 18

O.K. as to form—E. F. B., H. C. L.

Quit Claim Deed from The Cleveland Southwestern Railway and Light Co. to Victor Emanuel, dated Dec. 31, 1924.

Know All Men By These Presents That The Cleveland Southwestern Railway and Light Company, a corporation incorporated under the laws of the State of Ohio, Grantor, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations, received to its full satisfaction of Victor Emanuel, the Grantee, has given, granted, remised, released and forever quit-claimed, and does by these presents, absolutely give, grant, remise, release and forever quit-claim unto the said Grantee, his heirs and assigns forever, all such right, title and interest as it, the said Grantor, has or ought to have in and to the following described premises: Situated in the City of Norwalk, County of Huron and State of Ohio, and described as follows:

1. All that part of the east half of Great Lot No. 95 in Section 4 Norwalk Township, bounded on the north by the right of way of The Wheeling & Lake Erie Railroad Company, on the west by the west line of the east half of said Lot No. 95; on the South by the North line of a right of way sixty six feet wide running parallel with said Railroad right of way and 132 feet (measured

at right angles) distant therefrom, and on the east by a line running parallel with said west line of said east one-half of lot 95 and 278.04 feet easterly therefrom. Also a right in common with C. H. Gallup and Lizzie F. Gallup, their heirs and assigns to said sixty six foot right of way, viz.: A strip of land sixty six feet wide running from Woodlawn Avenue on the east to the west line of said east half of Lot No. 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said Wheeling & Lake Erie Railroad Company's right of way and running parallel therewith.

2. Also a leasehold of four by ten rods off the west end of said sixty six foot strip, for description of land and extent of title leased, reference is hereby made to lease record, Vol. 2, pages 12 and 13, Huron County, Ohio.

To Have and To Hold the premises aforesaid, with the appurtenances thereunto belonging to the said Grantee, his heirs and assigns, so that neither the said Grantor nor its successors or assigns, nor any persons claiming title through or under it, shall or will hereafter claim any right or title to the premises or any part thereof; that they and every one of them shall by these presents be excluded and forever barred.

In witness whereof, said corporation sets its hand and corporate seal, by F. H. Wilson, its president and C. J. Mayers, its secretary, this 31st day of December, 1924.

The Cleveland Southwestern Railway
and Light Company
By F. H. Wilson, President
By C. J. Mayers, Secretary.

Signed in the presence of (Seal)
A. M. Nisson
L. M. Miller.

State of Ohio, Cuyahoga County, ss.

Before me, a Notary Public in and for said County, personally appeared the above named F. H. Wilson and C. J. Mayers, president and secretary respectively of The Cleveland Southwestern Railway and Light Company, who acknowledged that they did sign the foregoing instrument, and that the same is the free act and deed of said corporation and the free act and deed of each of them personally and as such officers.

In testimony whereof, I have hereunto set my hand

and official seal at Cleveland, Ohio, this 31st day of December, A. D. 1924.

Gardner Abbott,
(Seal) Notary Public.

$10.00 U. S. R. stamp attached and cancelled.

The above deed was received for record by the Recorder of Huron County, Ohio, February 5, 1925, at 9:30 A.M., and recorded February 6, 1925, in Deed Records of Huron County, Ohio, Volume 106, pages 586 and 587.

PLAINTIFF'S EXHIBIT No. 19

O.K. as to form—E. F. B., H. C. L.

Before
THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 3444

In the matter of the Joint Application of Victor Emanuel and Ohio Electric Power Company for authority to respectively sell and purchase public utility property.

JOINT PETITION

Come now Victor Emanuel and Ohio Electric Power Company, pursuant to the provisions of Sec. 614-60, General Code of Ohio, and, representing and showing to your Honorable Commission:

1. That your applicant, Victor Emanuel, is a citizen and resident of the City of New York, State of New York, who now owns and operates as a public utility subject to the jurisdiction of your Honorable Commission, the electrical utility property specifically known as

(1) The three-phase, high tension electric line extending from the power house and substation of The Cleveland Southwestern Railway and Light Company in the City of Norwalk, Ohio, to the point of connection of said line with the right-of-way of said Railway and Light Company at or near the intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin, Ohio, extended east of Oberlin;

(2) The three-phase, high tension electric line extending from the west property line of the Elyria car shops of said The Cleveland Southwestern Railway and Light Company in the City of Elyria, Ohio, to the aforesaid point of intersection of the right-of-way of said Railway and Light Company and the (1) transmission line, and

(3) Certain equipment and pole line and pole line rights, together with substations at Oberlin, Birmingham and Norwalk, Ohio, and a power station at Norwalk, Ohio, and distribution wires and equipment appurtenant thereto and used for the distribution of electrical energy to consumers thereof in said City of Norwalk and along said transmission lines, and certain primary and secondary power and light lines or wires, including a line to Kipton, Ohio, a summary of which property with the fair reproductive cost new thereof, and the accrued depreciation, and the reasonable present value whereof, is as follows, to-wit:

Item	Reproduction Cost	Depreciation Pct.	Depreciation Amount	Present Value
Real Estate, Norwalk.	1,500.00	0	0	1,500.00
Power House, Bldgs. & Stock Norwalk.	21,700.00	31	6,785.00	14,915.00
Power House Equipment ...	48,441.00	58	22,187.00	20,254.00
Substations. ...	4,475.00	10	445.00	4,030.00
Distribution Systems	46,155.00	18	8,257.00	37,898.00
Transmission Lines.	88,619.00	35	29,448.00	59,171.00
Office Furniture and Tools.....	1,320.00	28	375.00	945.00
Physical Property ...	$212,210.00	35	$73,497.00	$138,713.00
Organization, etc. 7%				9,710.00

Working Capital, Materials and Supplies 5%.	6,936.00
Cost of Attaching Business, 598 Customers @ $10.00	5,980.00
	$161,339.00

which said inventory has heretofore been checked by the engineers of your Honorable Commission and which said valuation figures have been investigated and approved by such engineers.

(2) That your applicant, Ohio Electric Power Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio and, in contemplation of its project of ultimately owning and operating public utility properties throughout the Commonwealth of Ohio has heretofore, with the consent and approval of your Honorable Commission, acquired and now owns and operates the public utility properties furnishing electric and gas service in the incorporated communities of Oberlin and Ravenna, Ohio;

(3) That your applicant, Victor Emanuel, has found it inexpedient to continue the operation, individually, of said public utility property aforesaid and finds that his co-applicant, the said Ohio Electric Power Company is willing to assume the responsibilities incident to the ownership and operation of said property;

(4) That, subject to the consent and approval of your Honorable Commission, your applicants have negotiated and made and entered into an agreement whereby and whereunder, for the agreed consideration $161,300.00, payable in cash, your applicant, the said Victor Emanuel, will sell and convey to your applicant, the said Ohio Electric Power Company all right and title to the public utility aforesaid, and

(5) That your applicants believe, and for full compliance with the provisions of the General Code of Ohio in such case made and provided, allege that the public will, upon the consummation of said proposed sale and purchase of said public utility property, be furnished adequate service for a reasonable and just rate, rental, toll or charge therefor.

Pray, That your Honorable Commission will cause such investigation and inquiries to be herein made and to examine such books, records and property as it deems necessary and proper and, thereupon, make and enter its order consenting to and approving the sale by your applicant, Victor Emanuel, and the purchase and acquisition by your applicant, Ohio Electric Power Company, of said property aforesaid, and giving and granting unto

your applicants all other and further relief which may be necessary and proper in the premises.

Victor Emanuel
Ohio Electric Power Company
By E. A. Shrider, Vice President
Attest: F. B. Fauver, Secretary.

State of New York, County of New York, ss:

Victor Emanuel, being first duly sworn, upon oath deposes and says that he is one of the parties Applicant in the foregoing Joint Petition; that he has read said Joint Petition and knows the contents thereof, and that the same are true to the best of his knowledge and belief.

Victor Emanuel

Sworn to and subscribed in my presence by the said Victor Emanuel, this 26th day of January, A. D. 1925.

William L. O'Connor
Notary Public

State of Ohio, County of Shelby, ss:

E. A. Schrider, being first duly sworn, upon oath deposes and says that he is an officer, to-wit: Vice President of Ohio Electric Power Company, one of the parties to the foregoing Joint Petition; that said Company is a corporation, and that he knows the contents of said Joint Petition and that the same are true to the best of his knowledge and belief.

E. A. Schrider

Sworn to and subscribed in my presence by the said E. A. Schrider, this 27th day of January, A. D. 1925.

Robert E. Marshall
Notary Public, Shelby County, Ohio.

State of Ohio, County of Lorain, ss:

L. B. Fauver, being first duly sworn, upon oath deposes and says that he is an officer, to-wit: Secretary of Ohio Electric Power Company, one of the parties to the foregoing Joint Petition; that said company is a corporation; that he knows the contents of said Joint Petition, and that the same are true to the best of his knowledge and belief.

L. B. Fauver

Sworn to and subscribed in my presence by the said L. V. Fauver this 29th day of January, A. D. 1925.

Florence Hamel
Notary Public.

CERTIFICATION

State of Ohio, County of Franklin, ss:

I, Ira E. Sprankle, the duly appointed, qualified and acting Superintendent of Investigation, in whose custody the books, papers, documents and records are filed, do hereby Certify there is transmitted herewith a true and correct copy of the application filed in Proceeding No. 3444, being

In the matter of the joint application of Victor Emanuel and Ohio Electric Power Company for authority to respectively sell and purchase public utility property.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of The Public Utilities Commission of Ohio, at Columbus, Ohio, this thirteenth day of January, A. D. 1930.

Ira E. Sprankle
Superintendent of Investigation
The Public Utilities Commission of Ohio

PLAINTIFF'S EXHIBIT No. 20

O.K. as to form—E. F. B., H. C. L.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 3444

In the matter of the joint application of Victor Emanuel and Ohio Electric Power Company for authority to respectively sell and purchase public utility property.

This day, it appearing to the Commission from the verified allegations in said application and the sworn statements and exhibits filed in connection therewith,

and other documentary evidence submitted, that the taking of oral testimony herein is unnecessary, this matter came on for consideration upon the joint application of Victor Emanuel of New York, New York, the present owner and operator of the electric transmission line extending, generally from Oberlin to Norwalk, and Elyria, and the electric distribution system in the City of Norwalk, Ohio, and the Ohio Electric Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, asking the consent to and approval, by this Commission of the sale, by said first named party and the purchase and acquisition by the latter, of said electrical utility property.

The Commission, being fully advised in the premises, finds from the pleadings and exhibits filed herein and its independent inquiry and investigation thereupon:

That, for purchase and sale purposes, the value of said electric utility property is not less than the sum of $161,339.00, and

That the public will, upon the consummation of said proposed sale and purchase of said public utility property, be furnished adequate service for a reasonable and just rate, rental, toll or charge therefor, and is satisfied that consent for said sale and purchase of property should be granted. It is, therefore,

Ordered, That said Victor Emanuel be, and hereby he is authorized to sell and convey to the said Ohio Power Company the property more specifically described in the application herein, which application, insofar as it describes and identifies the said property hereby is made a part of this order by reference, and consisting, generally, of the electric transmission line extending from Oberlin to Norwalk and Elyria, Ohio, with appurtenant distribution plant, including the distribution plant in the City of Norwalk, Ohio; and the said Ohio Electric Power Company hereby is authorized to purchase and acquire said property and to pay therefor the agreed consideration of $161,300.00. It is further

Ordered, That, forthwith upon the exercise of the authority herein granted, the said parties file with this Commission schedules providing for their respective withdrawal from an inauguration of service within the territory now served by means of said property. It is further

Ordered, That nothing herein shall be construed to be a consent to or approval by this Commission of any increase in rates or diminution of service within the territory now served by means of said property, nor shall

the findings hereinbefore set forth as to the value of said property, rates and service, nor the within acquiescence in the passing of the agreed consideration, be binding upon this Commission in any future proceedings involving rates or service.

The Public Utilities Commission of Ohio
Charles C. Marshall, Chairman.
George T. Poor,
Frank B. Maullar,
Commissioners.

Dated at Columbus, Ohio
This fourth day of February, 1925.

CERTIFICATION

State of Ohio, County of Franklin, ss:

I, Ira E. Sprankle, the duly appointed, qualified and acting Superintendent of Investigation, in whose custody the books, papers, documents and records are filed, do hereby Certify there is transmitted herewith a true and correct copy of the order of The Public Utilities Commission of Ohio in Proceeding No. 3444, being

In the matter of the joint application of Victor Emanuel and Ohio Electric Power Company for authority to respectively sell and purchase public utility property.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of The Public Utilities Commission of Ohio, at Columbus, Ohio, this thirteenth day of January, A. D. 1930.

Ira E. Sprankle (Signed)
Superintendent of Investigation
The Public Utilities Commission of Ohio.

PLAINTIFF'S EXHIBIT No. 21

O.K. as to form—E. F. B., H. C. L.

THESE ARTICLES OF INCORPORATION
OF
OHIO ELECTRIC POWER COMPANY

Witnesseth, That we the undersigned, Robert E. Marshall, E. A. Shrider, H. M. Phillippi, H. L. Christman and L. L. Stahler, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general laws of the said State, do hereby certify:

First. The name of said corporation shall be Ohio Electric Power Company.

Second: Said corporation is to be located at Sidney, Shelby County, Ohio, and its principal business there transacted.

Third: Said corporation is formed for the purpose of building, owning, acquiring, leasing, operating and maintaining power plants, equipment, appliances and appurtenances thereto together with the erection, construction, maintenance and operation of the necessary pole lines, posts, piers, abutments, wires, cables, and conduits and incidental thereto to drill for gas, produce gas, incident to its business, to lay pipes, conduits, manholes, mains, and other appliances and fixtures necessary and proper for the generating, manufacturing, producing, procuring, selling, furnishing, supplying, conducting, carrying, transmitting, and distributing to public and private buildings, avenues, lanes, alleys, and squares and public places, and to public and private consumers, steam and hot water, electrical power, light and energy and natural and artificial gas for light, heat and other purposes, in the several municipalities, counties, and political and governmental subdivisions thereof, in the State of Ohio. Also to acquire all franchises necessary to the full exercise of said powers. And incidental to said purpose to acquire and use street railways, to own, buy, sell, exchange, lease and generally deal in electrical equipment, appliances, utensils, devices and machinery, to have one or more offices, places of business, plants or factories; and to hold, purchase or otherwise acquire or to mortgage, sell or convey real or personal property within or outside the State of Ohio; to apply for, register, acquire and to use, hold, transfer, sell and dispose of any patent rights, trade-marks, trade names, copyrights; to acquire, operate or dispose of any property, interests or things of value along its lines or within the territory

contiguous; to erect, purchase, hold, take or lease or otherwise acquire buildings or property which may be necessary for its business; to borrow money or contract debts within the lawful exercise of its corporate privilege or franchises or for any other lawful purpose or purposes and to use and dispose of its obligations therefor; and to secure the payment of all such obligations by mortgage or mortgages upon any or all of the property of every character of said corporation; and to purchase, acquire, take, receive, hold, own, sell, or otherwise dispose of the capital stock, bonds, debentures, securities or other obligations or evidences of indebtedness of any other person, firm or corporation, private or public, municipal or otherwise, necessary or proper for the transaction of its business or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose; and to execute, make, give and perform any and every agreement or contract, necessary or desirable for carrying on any or all of the business of said corporation and to do all and everything necessary, suitable or proper for the accomplishment of the purposes or attainment of any of the objects herein enumerated and which shall, at any time, appear expedient for the benefit or protection of said corporation or its rights, property or assets or calculated to enhance the value thereof, and to do any and all of the things herein set forth to the same extent as a natural person might or could do and in furtherance and not in limitation of the general powers conferred by the laws of the State of Ohio; and also to do and perform all other things that it may legally do.

Fourth. The total number of authorized shares which may be issued by the corporation is fifteen thousand (15,000) shares of which five thousand (5,000) shares shall be common shares without nominal or par value and ten thousand (10,000) shares shall be preferred shares of the par value of One Hundred ($100) Dollars each.

The terms and provisions under which the preferred stock shall be issued are as follows:

The holders of the preferred stock are entitled to receive, when and as declared, from the surplus and/or net profits of the corporation, dividends at the rate of, but never exceeding, seven per centum per annum on the par value thereof, payable quarterly on dates to be fixed by the Regulations. The dividends on such preferred stock shall be cumulative and shall be payable before any dividends on the common stock shall be paid or set apart, so that if in any year dividends amounting to seven per

centum shall not have been paid on such preferred stock, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock. Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall have been paid, and the accrued quarterly installments for the current year shall have been declared and shall have been paid, or there shall have been set aside from the surplus and/or net profits of the corporation a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the common stock, payable then or thereafter, out of the remaining surplus and/or net profits. In the event of liquidation, dissolution or winding up, whether voluntary or involuntary, of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the par amount of their shares and the unpaid cumulative dividends accrued thereon and no more, before any amount shall be paid to the holders of the common stock, and after such payment in full to the holders of the preferred stock of its par value and the unpaid accrued cumulative dividends thereon, the remaining assets and funds shall be divided among and paid to the holders of the common stock, according to their respective shares. The right and privilege is reserved to the corporation on any dividend payment date, as and when and in the manner determined by its Board of Directors to redeem all or any part of the preferred stock of the corporation by paying to the holders thereof One Hundred ten (110) Dollars per share and the amount of all cumulative dividends accrued and unpaid thereon at the date fixed for such redemption, provided that thirty days previous notice of such proposed redemption shall have been given to the holders of the shares to be redeemed by mailing such notice to them at their respective addresses as shown on the books of the corporation. From and after the date fixed in any such notice as the date of redemption (unless default be made by the corporation in the payment of the redemption price pursuant to such notice) all dividends on the shares of the said preferred stock called for redemption shall cease to accrue, and all rights of the holders thereof, as stockholders of the corporation, except the right to receive the redemption price, shall cease and determine.

The voting power of shares shall be vested wholly in the holders of the shares of the common stock, except as hereinafter provided. The preferred capital stock shall have no voting power whatever, except and unless

the corporation shall default in quarterly dividend payments aggregating seven (7%) per cent. in which event the holders of the preferred stock shall be entitled to vote their shares in the manner now provided by Statute, until such default shall be made good, whereupon such voting powers shall cease and determine until and unless a like default occurs.

The corporation shall not, without the affirmative vote or written consent of the holders of two-thirds in amount of the outstanding preferred stock, create or issue any shares of stock which shall have any preference or priority over the preferred stock, nor shall any amendment to the charter of the corporation be made diminishing the rights of the holders of the preferred stock without like vote or written consent.

Fifth. The amount of common capital with which the corporation will begin to carry on business is Five Hundred ($500) Dollars.

In Witness Whereof, we have hereunto set our hands, this 9th day of August, 1924.

Robert E. Marshall
E. A. Shrider
H. M. Phillippi
H. L. Christman
L. L. Stahler.

The State of Ohio, County of Shelby, ss.

Personally appeared before me, the undersigned, a Notary Public, in and for said County, this 9th day of August, A. D. 1924, the above named Robert E. Marshall, E. A. Shrider, H. M. Phillippi, H. L. Christman, and L. L. Stahler, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

J. C. Royon,
Notary Public.

(Seal)

The State of Ohio, County of Shelby, ss.

I, William A. Darst, Clerk of the Court of Common Pleas, within and for the County aforesaid, do hereby certify that J. C. Royon, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was, at the date thereof, a Notary Public, in and for said County, duly commissioned and authorized as such to take said acknowledgment; and further, that I am well acquainted

with his handwriting, and believe that the signature to said acknowledgment is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Sidney, Shelby County, Ohio, this 9th day of August, A. D. 1924.

William A. Darst,
Clerk.

(Seal)

United States of America, State of Ohio,
Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of Ohio Electric Power Company filed in this office on the 12th day of August, A. D. 1924, and recorded in Volume 314, Page 261, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 14th day of January, A. D. 1930.

(Signed) Clarence J. Brown,
Secretary of State.

(Seal)

PLAINTIFF'S EXHIBIT No. 22

O.K. as to form—E. F. B., H. C. L.

BILL OF SALE

Victor Emanuel, Grantor
Ohio Electric Power Company, Grantee

Know All Men by These Presents, that Victor Emanuel, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations, received to his full satisfaction of Ohio Electric Power Company, an Ohio Corporation, the Grantee, does hereby grant, convey, assign, transfer and deliver unto said

Ohio Electric Power Company, its successors and assigns, all and singular, the following described property, to-wit:

(a) That certain three phase high tension line, poles and equipment therefor between the power house and sub-station in the City of Norwalk of the Grantor and the point of intersection of the Elyria-Oberlin Road, and East Lorain Street in the Village of Oberlin extended, east of Oberlin.

(b) That certain three phase high tension line, poles and equipment therefor, extending from the high tension line hereinbefore described in Paragraph (a) hereof, to the Oberlin Water Works in the Village of Oberlin, together also with all sub-station equipment in connection therewith of the Grantor in the City of Oberlin, said equipment including all artitcles of personal property and all appurtenances in and to said high tension line mentioned in this paragraph.

(c) All primary and secondary light lines of the Grantor located on the poles referred to in Paragraphs (a) and (b) hereof and, or used in connection with the power and light business of the Grantor, including (1) approximately 3.9 miles of line between the city limits of the City of Norwalk and Stop 35 upon the Electric Interurban Railroad of the Grantor and (2) Line from point of connection with said high tension line described in Paragraph (a) hereof to and in the Village of Kipton, Ohio, and including all distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto, or used in connection therewith of the Grantor, within said Village of Kipton.

(d) All distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the Grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines and poles of the Grantor, approximately 5.2 miles of lines on poles of others than the Grantor and approximately 4.3 miles of lines on poles owned jointly by the Grantor and others, together with all right, title and interest of the Grantor in and to the poles so occupied jointly.

(e) All equipment, material, appurtenances of the Grantor in and to the Power House and Sub-station of the Grantor in the City of Norwalk, Ohio, including boilers, engines, frequency changer, transformers, oil switches, metering equipment, rotary converter.

Also all switching equipment, transformers, appurtenances and other equipment in connection with said

three phase high tension line mentioned in Paragraph (a) hereof and located in the Railroad Station of the Grantor in the Village of Birmingham, Ohio, and used in connection with the commercial power and light business of the Grantor.

(f) That certain three phase high tension wire, cross arms, pins and insulators between the point of intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin extended, east of Oberlin (referred to in Paragraph (a)) and the point on the right-of-way of The Electric Interurban Railway of The Cleveland Southwestern Railway & Light Company where the Polk High Tension Line of the Grantor, so-called, intersects said railway right-of-way and the pole line in connection therewith at Stop 100 on said right-of-way, more commonly known as Wack's Cheese Factory.

(g) That certain three phase high tension wire, pins and insulators located on the north side of poles of The Cleveland Southwestern Railway & Light Company between said Stop 100 referred to in Paragraph (f) hereof and the west property line of the car shops of the said The Cleveland Southwestern Railway & Light Company in the City of Elyria, Ohio.

It being the intention of the Grantor to assign, transfer, convey and deliver unto the Grantee, all personal property, equipment and appurtenances used by the Grantor in the conduct of his business of furnishing and supplying electrical energy for heat, light and power between said point of intersection of the Elyria-Oberlin Road and East Lorain Street in the Village of Oberlin extended, east of Oberlin, and the Power House and Substation of the Grantor in the City of Norwalk, or useful in the conduct of said business; excepting, however, therefrom the trolley wires, feeder wires, telephone wires, cross arms and attachments in connection therewith, belonging to the Grantor upon the poles supporting said high tension line between said City of Norwalk and point of intersection east of Oberlin.

Said property being the same property acquired by the Grantor from The Cleveland Southwestern Railway & Light Company, by Bill of Sale dated December 31, 1924.

To Have and To Hold the same unto said Grantee, its successors or assigns forever. And the said Grantor hereby covenants to and with the said Grantee that said Grantor is the lawful owner of the above-described goods and chattels; that the Grantor has good right and author-

ity to sell the same as aforesaid, and that said Grantor will warrant and defend the same against all lawful claims and demands whatsoever.

In Witness Whereof, Victor Emanuel has hereunto set his hand and seal at New York City, N. Y., as of the 22d day of May, 1925.

Victor Emanuel (Signed)

Signed in the presence of:
F. D. Reid (Signed)
C. B. Zeigler (Signed)

PLAINTIFF'S EXHIBIT No. 23

O.K. as to form—E. F. B., H. C. L.

QUIT-CLAIM DEED, DATED MAY 22, 1925, FROM VICTOR EMANUEL TO OHIO ELECTRIC POWER CO.

QUIT-CLAIM DEED

Property Located in the City of Norwalk, Ohio.

Know All Men by These Presents, That I, Victor Emanuel, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations, received to my full satisfaction of Ohio Electric Power Company, a corporation organized and existing under the laws of the State of Ohio, the Grantee, have given, granted, remised, released and forever quit-claimed, and do by these presents, absolutely give, grant, remise, release and forever quit-claim unto the said Grantee, its successors and assigns forever, all such right, title and interest as I, the said Grantor, have or ought to have in and to the following described premises:

Situated in the City of Norwalk, County of Huron and State of Ohio, and described as follows:

1. All that part of the east half of Great Lot No. 95 in Section 4 Norwalk Township, bounded on the north by the right-of-way of The Wheeling & Lake Erie Railroad Company, on the west by the west line of the east half of said lot No. 95; on the south by the north line of a right-of-way sixty-six feet wide running parallel with said Railroad right-of-way and 132 feet (measured at right angles) distant therefrom, and on the east by a line running parallel with said west line of said east one-half of lot 95 and 278.04 feet easterly therefrom. Also a right in common with C. H. Gallup and Lizzie F. Gallup, their heirs and assigns, to said sixty-six foot right-of-way, viz.: A strip of land sixty-six feet wide running from Woodlawn Avenue on the east to the west line of said east half of Lot No. 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said Wheeling & Lake Erie Railroad Company's right-of-way and running parallel therewith.

2. Also a leasehold of four by ten rods off the west end of said sixty-six foot strip, for description of land and extent of title leased, reference is hereby made to lease record Vol. 2, pages 12 and 13, Huron County, Ohio.

Said premises being the same deeded to this Grantor by the Cleveland Southwestern Railway & Light Company under date of December 31, 1924.

To Have and To Hold the premises aforesaid, with the appurtenances thereunto belonging to the said Grantee, its successors and assigns, so that neither the said Grantor, nor his heirs, administrators or assigns, nor any person claiming title through or under him, shall or will hereafter claim any right or title to the premises or any part thereof; that they and every one of them shall by these presents be excluded and forever barred.

And for the consideration aforesaid, I, Dorothy Woodruff Emanuel, wife of the said Victor Emanuel, do hereby release unto the Grantee, its successors and assigns, all right of or to both dower and homestead in the granted premises.

In Witness Whereof, we, the said Victor Emanuel and Dorothy Woodruff Emanuel, his wife, have hereunto set our hands and seals this 22nd day of May, 1925.

Victor Emanuel, L.S.

Signed in the presence of:

C. B. Zeigler
W. R. Porter

Dorothy W. Emanuel, L.S.

C. B. Zeigler,
Kate Wilson.

State of New York, County of New York, ss.

Before me, Mae B. Coy, a Notary Public in and for said County, personally appeared the above-named Victor Emanuel and Dorothy Woodruff Emanuel, his wife, who severally acknowledged that they did sign the foregoing instrument and that the same is their voluntary and free act and deed.

In Testimony Whereof, I have hereunto set my hand and official seal at New York City, this 22nd day of May, 1925.

Mae B. Coy,
(Notarial Seal) Notary Public.

New York County Clerk's No. 383.
New York County Register's No. 7337.
Commission expires Mar. 30th, 1927.

PLAINTIFF'S EXHIBIT No. 24

O.K. as to form—E. F. B., H. C. L.

Assignment of Contracts, Rights, Franchises and Privileges from Victor Emanuel, Grantor, to Ohio Electric Power Company, Grantee.

Know All Men by These Presents, that Victor Emanuel, Grantor, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations received to his full satisfaction of Ohio Electric Power Company, the Grantee, does hereby sell, assign and convey to said Grantee, its successors or assigns, the following described agreements and contracts:

(a) Contract between the Village of Oberlin, County of Lorain and State of Ohio, Party of the First Part, and The Cleveland Southwestern and Columbus Railway Company, Party of the Second Part, dated November 29, 1919, approved by Ordinance of the Council of the Village of Oberlin, County of Lorain, Ohio, Au-

gust 19, 1919, which said contract was duly assigned to The Cleveland Southwestern Railway and Light Company, by said Cleveland Southwestern & Columbus Railway Company and F. H. Wilson, Special Master thereof, by assignment dated April 15th, 1924.

(b) Contract between the Farmers Electric Power and Light Company and The Cleveland Southwestern Railway and Light Company dated October 8, 1924.

(c) Contract by and between The Wakeman & Butler Road Electric Company, Ltd., an Ohio corporation and The Cleveland Southwestern Railway and Light Company dated October 15, 1924.

(d) Contract between The Cleveland Southwestern & Columbus Railway Company and the Mutual Power and Light Company, an Ohio corporation, dated March 15, 1919, which contract was assigned by The Cleveland Southwestern & Columbus Railway Company and F. H. Wilson, Special Master thereof, to The Cleveland Southwestern Railway & Light Company by assignment dated April 15th, 1924; together with Supplemental Agreement by and between said The Cleveland Southwestern & Columbus Railway Company and said The Mutual Light and Power Company dated October 16, 1923, and assigned to The Cleveland Southwestern Railway & Light Company by said assignment dated April 15, 1924.

(e) Agreement by and between certain persons designated as owners and using electric current for power, heat and light, and F. H. Wilson, Receiver of The Cleveland Southwestern & Columbus Railway Company dated October 25, 1922, and contracting with respect to a certain pole line running from Birmingham, Florence Township, Erie County, Ohio, to Kipton, Ohio, which contract is duly assigned by said F. H. Wilson, Special Master, to the Cleveland Southwestern Railway & Light Company by said assignment dated April 15th, 1924.

(f) Agreement between The Norwalk Gas and Electric Company and The Cleveland Southwestern Traction Company dated February 14, 1903, together with certified abstract from the records of the City of Norwalk, Ohio, recorded in Council Journal Volume 7, pages 65-75, consenting to such agreement, which agreement and the rights thereunder of said The Cleveland Southwestern Traction Company were transferred to The Cleveland Southwestern & Columbus Railway Company, successor to said The Cleveland and Southwestern Traction Company, and which agreement was duly assigned to The Cleveland Southwestern Railway and Light Company by said The Cleveland Southwestern & Columbus Railway

Company and F. H. Wilson, Special Master thereof, by assignment dated April 15, 1924. Together, also, with all contracts, franchises, grants, rights and privileges which the Grantor has or may have in the City of Norwalk, Ohio, in connection with the conduct of an electric light, heat and power business in said City.

(g) Agreement between certain owners desirous of securing electric current for power, light and heat, and F. H. Wilson, Receiver of The Cleveland Southwestern & Columbus Railway Company dated March 4, 1922, and assigned by said F. H. Wilson, Special Master aforesaid, to The Cleveland Southwestern Railway and Light Company by assignment dated April 15th, 1924.

(h) Together also with all contracts or agreements of the Grantor for the furnishing of light, heat and power from the certain three phase high tension lines of the Grantor assigned, transferred and conveyed to the Grantor by Bill of Sale from The Cleveland Southwestern Railway & Light Company, dated December 31, 1924, and extending from the west property line of the Elyria car barns of The Cleveland Southwestern Railway & Light Company to the City of Norwalk; and any such contracts or agreements in the corporate limits of the Village of Oberlin, Ohio, and also such contracts, franchises, rights, privileges and agreements of the Grantor in the City of Norwalk, Ohio.

Such rights and privileges having been acquired by deed of assignment to this Grantor from The Cleveland Southwestern Railway & Light Company under date of December 31, 1924, to which reference is hereby made. It being hereby the intention to convey to the Grantee all the right, title and interest acquired by Grantor under and by virtue of said deed above mentioned, and under and by virtue of the contracts therein referred to.

In Witness Whereof, Victor Emanuel has hereunto set his hand and seal, at New York City, N. Y., this 22nd day of May, 1925.

Victor Emanuel

Witnesses:
F. D. Reid,
C. B. Zeigler.

PLAINTIFF'S EXHIBIT No. 25

O.K. as to form—E. F. B., H. C. L.

Quit Claim Deed from Victor and Dorothy W. Emanuel to Ohio Electric Power Co., Dated May 22, 1925.

Know All Men by These Presents That I, Victor Emanuel, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations, received to my full satisfaction of Ohio Electric Power Company, a corporation organized and existing under the laws of the State of Ohio, the Grantee, have given, granted, remised, released and forever quit-claimed, and do by these presents, absolutely give, grant, remise, release and forever quit claim unto the said Grantee, its successors and assigns forever, all such right, title and interest as I, the said Grantor, have or ought to have in and to the following described premises: Situated in the City of Norwalk, County of Huron and State of Ohio, and described as follows:

1. All that part of the east half of Great Lot No. 95 in Section 4 Norwalk Township, bounded on the north by the right of way of The Wheeling & Lake Erie Railroad Company, on the west by the west line of the east half of said Lot No. 95; on the south by the north line of a right of way sixty six feet wide running parallel with said Railroad right of way and 132 feet (measured at right angles) distant therefrom and on the east by a line running parallel with said west line of said east one-half of lot 95 and 278.04 feet easterly therefrom. Also a right in common with C. H. Gallup and Lizzie F. Gallup, their heirs and assigns to said sixty six foot right of way, viz.: A strip of land sixty six feet wide running from Woodlawn Avenue on the east to the west line of said east half of Lot No. 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said Wheeling & Lake Erie Railroad Company's right of way and running parallel therewith.

2. Also a leasehold of four by ten rods off the west end of said sixty six foot strip, for description of land and extent of title leased, reference is hereby made to lease record Vol. 2 pages 12 and 13, Huron County, Ohio. Said premises being the same deeded to this Grantor by the Cleveland Southwestern Railway & Light Company under date of December 31, 1924.

To Have and To Hold the premises aforesaid, with the appurtenances thereunto belonging to the said

Grantee, its successors and assigns, so that neither the said Grantor nor his heirs, administrators or assigns, nor any person claiming title through or under him, shall or will hereafter claim any right or title to the premises or any part thereof; that they and every one of them shall by these presents be excluded and forever barred. And for the consideration aforesaid, I, Dorothy Woodruff Emanuel, wife of said Victor Emanuel, do hereby release unto the Grantee, its successors and assigns, all right of or to both dower and homestead in the granted premises.

In Witness Whereof, we the said Victor Emanuel and Dorothy Woodruff Emanuel, his wife, have hereunto set our hands and seals, this 22nd day of May, 1925.

Victor Emanuel L.S.
Dorothy W. Emanuel L.S.

Signed in the presence of:
C. B. Zeigler W. R. Porter
C. B. Zeigler Kate Wilson

State of New York, County of New York, ss.

Before me, Mae B. Coy, a Notary Public in and for said County, personally appeared the above named Victor Emanuel and Dorothy Woodruff Emanuel, his wife, who severally acknowledged that they did sign the foregoing instrument and that the same is their voluntary and free act and deed. In testimony whereof, I have hereunto set my hand and official seal at New York City, this 22nd day of May, 1925.

(Notarial Seal) Mae B. Coy.
New York County Clerk's No. 383.
New York County Register's No. 7737.
Commission expires Mar. 30th, 1927.

State of New York, County of New York, ss.
No. 9279 Series B

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, do hereby certify that Mae B. Coy whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such deposition or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledg-

ments and proofs of deeds, or conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the hand writing of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court and County, the 23rd day of May, 1925.

(Seal) James A. Donegan, Clerk.

$10.00 U. S. R. Stamp attached and cancelled.

The above deed was received for record by the Recorder of Huron County, Ohio, May 27, 1925, and recorded May 27, 1925, in Deed Records of Huron County, Ohio, Volume 107, pages 398 and 399.

PLAINTIFF'S EXHIBIT No. 26

O.K. as to form—H. C. L., E. F. B.

#151002—General Electric Company to Cleveland, Southwestern & Columbus Railway Company, et al.

The United States of America, Northern District of Ohio, Eastern Division, ss.

At a stated term of the District Court of the United States, within and for the Eastern Division of the Northern District of Ohio, begun and held at the City of Cleveland, in said District on the first Tuesday in April, being the first day of said month, in the year of our Lord one thousand nine hundred twenty-four, and of the Independence of the United States of America, the one hundred and forty-eighth, to-wit: on Monday, the 7th day of April, A. D. 1924. Present: Honorable D. C. Westenhaver, United States District Judge. Among the proceedings then and there had were the following, to-wit:

In the United States District Court, Northern District of Ohio, Eastern Division

In Equity No. 690

General Electric Company, Complainant,
vs.
Cleveland, Southwestern & Columbus Railway Company, et al., Defendants.

Order of Confirmation

This cause coming on this day to be heard upon the return of sale and report of F. H. Wilson, Special Master, of the sale of the properties mentioned in the decree entered in this cause on February 9, 1924, and upon the motion of the intervening petitioner, The Guardian Savings & Trust Company, Trustee, for the approval of said report and the rejection of bids on separate parcels, and for the confirmation of the sale of said properties as a whole.

The Court finds: that pursuant to said said decree entered February 9, 1924, the said Special Master F. H. Wilson, did duly advertise the sale of said properties by publication of a due and proper notice thereof in the Cleveland Plain Dealer, a newspaper published in Cleveland, Cuyahoga County, Ohio, and of general circulation in the Counties of Huron, Lorain, Cuyahoga, Medina, Wayne, Ashland, Richland and Crawford, Ohio, on February 13, 20, and 27, and March 4, 1924, and that the said notice of sale and publication thereof conforms in all respects to the orders of this Court and the statutes in such cases made and provided.

The Court further finds that the said Special Master did, in pursuance to the decree of this Court file schedules of properties and contracts with the Clerk of this Court not less than ten days prior to the date of such sale.

The Court further finds that the said sale was held in all respects in accordance with the orders of this Court and in accordance with law, and that the report and recommendations of the Special Master are reasonable and proper, and that the bid of John S. Fleek for the properties as a whole is a reasonable and proper sum and price therefor.

The Court further finds that said John S. Fleek has nominated The Cleveland, Southwestern Railway & Light Company to receive title to and possession of all of said properties purchased by said John S. Fleek as aforesaid.

The Court further finds that the expenses and allowance of the Trustees, their Counsel and of the Special Master as set forth in Exhibits "A" and "B" are proper.

The Court further finds that there is necessary for the payment of expenses found in Article X (a) and (b) of decree of foreclosure entered herein February 9, 1924, the sum of Thirty Thousand Two Hundred Eight and 95/100 Dollars ($30,208.95) which amount must be paid in cash; that there is in possession of the Receiver of this Court sufficient funds to pay his obligations and indebtedness other than receiver's certificates and liabilities for personal injury or damage and taxes, assessments and liens, all to be assumed by the purchaser under the provisions of Article VIII (a), (b), (c) and (d) of said decree.

Wherefore, it is Ordered, Adjudged and Decreed:

1. That the separate bids for the separate parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 be rejected.

2. That the sale of parcels Nos. 1, 2, 3 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 as a whole to John S. Fleck for Four Million Six Hundred and Five Thousand Dollars ($4,605,000.00) be confirmed. Said F. H. Wilson, Special Master, is hereby authorized and directed to execute good and sufficient deeds, bills of sale, assignments and instruments of transfer to all of the properties, real and personal, tangible and intangible, described as Parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 in the decree of sale and in the notice of sale, to The Cleveland, Southwestern Railway & Light Company its successors and assigns.

Delivery of such deeds, bills of sale, assignments and instruments of transfer shall be upon payment by said The Cleveland, Southwestern Railway & Light Company of the following in cash:

(a) The sum of Thirty Thousand Two Hundred Eight and 95/100 Dollars ($30,208.95) hereinbefore found to be the costs and expenses of said sale other than the costs of court.

(b) Court costs.

(c) The balance of said purchase price in Receiver's Certificate or Bonds and Coupons in accordance with the provisions of Article VII of said decree of foreclosure.

The Special Master shall determine the amount applicable to each such bond and coupon and such purchaser shall pay in cash such amount upon all bonds and coupons not presented by him. Said Special Master shall make further report to this Court of the amount so found to be applicable to each such bond and coupon.

It is further ordered that the transfer of said properties be made as of March 1, 1924, and that an accounting be had between said John S. Fleek, or his nominees, and F. H. Wilson, the duly appointed Receiver in this cause, as of March 1, 1924, relative to the receipts, disbursements and adjustments to be made in reference to the said properties as of March 1, 1924.

The properties to be transferred as provided in said decree and in the said notice of sale, and the properties which the said Special Master shall transfer to the said The Cleveland, Southwestern Railway & Light Company, are more particularly described in the form of said deeds, instruments of transfer and conveyance as attached to the report of the Special Master filed herein, which deeds, instruments of transfer and conveyance are hereby approved.

It is further ordered that upon receipt of the said purchase price and upon the execution and delivery of the instruments of transfer aforesaid the said Receiver, F. H. Wilson, is hereby authorized and directed to surrender and give up possession of all of said properties aforesaid to The Cleveland, Southwestern Railway & Light Company thereof, and to surrender up to the said transferree or transferrees all books, records, abstracts, maps, surveys, evidences or muniments of title now in his possession, relating to the properties so transferred.

It is further ordered that the expenses of the Receiver F. H. Wilson, since March 1, in respect to the transfer of the properties as hereinbefore ordered, be paid from the revenues of the properties operated by him as Receiver and that upon such transfer said Receiver be and he is hereby authorized and directed to deliver the balance of the funds to said The Cleveland, Southwestern Railway and Light Company, together with an accounting since March 1, 1924.

In addition thereto said F. H. Wilson for his service as Special Master and as additional compensation to him for his services as Receiver in this cause, is allowed the sum of Ten Thousand Dollars ($10,000.00). Such sum should be paid to the extent that funds are available funds in the hands of the Receiver resulting from the operation of the road. The balance thereof should be taxed as costs of the court in this action.

It is further ordered that F. H. Wilson, Special Master as aforesaid, make within thirty days of the date of this decree, a further report of his proceedings.

D. C. Westenhaver,
District Judge.

April 7, 1924.

The United States of America, Northern District of Ohio, Eastern Division.

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Order of Confirmation entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term and on the day therein named, and do further certify that the same is a true, full and complete transcript and copy thereof. Witness my official signature, and the seal of said Court at Cleveland, in said District this 17th day of April, A. D. 1924, and the 148 year of the Independence of the United States of America.

B. C. Miller, Clerk

(Seal) By W. B. Salsgiver, Deputy Clerk.

Rec'd May 6, 1924, at 3:56 P. M.

Recorded May 14, 1924, Wm. G. Mitchell, Recorder.

Elyria, Ohio, Nov. 10, 1930.

This is to certify that this is a true and correct copy of Order of Confirmation as found Recorded in Deed Volume 198, page 621 of Lorain County Records.

Given under my hand and seal of office the day and year first above written.

(Signed) Wm. G. Mitchell, Recorder.

Wm. G. Mitchell, Recorder of Lorain County, O.

(Signed) By C. J. Phelps, Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 27

O.K. as to form—H. C. L., E. F. B.

CERTIFIED COPY

No. 151003 DEED OF SPECIAL MASTER

General Electric Company vs. The Cleveland, Southwestern & Col. Ry. Co. Know all men by these Presents: That, whereas, in an action pending in the United States District Court for the Northern District of Ohio, Eastern Division, being cause in Equity No. 690, wherein General Electric Company is complainant and The Cleveland, Southwestern & Columbus Railway Company is defendant, F. H. Wilson was duly appointed Receiver of all of the properties of The Cleveland, Southwestern & Columbus Railway Company including the properties hereinafter described; and

Whereas, said cause came on for hearing upon the petition of the complainant, the intervening petition of The Guardian Savings & Trust Company, Trustee, and the answers and cross-petitions of the said defendants above mentioned and the answers of The Cleveland, Southwestern & Columbus Railway Company to said intervening petition and answers and cross-petitions, and upon the report of F. H. Wilson, duly appointed, qualified and acting Receiver of said The Cleveland, Southwestern & Columbus Railway Company and upon the claims and liens against the said Railway Company as appear from the books of said Railway Company and from the several Mortgages, Deeds of Trust, Car Trust Agreements, claims for laborers' services and material and general claims filed with the Receiver and on February 9, 1924, a decree in foreclosure was entered by the District Court aforesaid; and

Whereas, in said decree the Court found that the conditions of the said Mortgages had been broken and that all parties claiming liens or interest in the properties hereinafter described had been made parties defendant in said action, and F. H. Wilson was duly appointed Special Master to make sale of the properties; and

Whereas, pursuant to the terms of said decree of February 9, 1924, notice of said sale was duly published in the Cleveland Plain Dealer, a newspaper published in Cuyahoga County, Ohio, and of general circulation in the Counties of Huron, Lorain, Cuyahoga, Medina, Wayne, Ashland, Richland, Erie and Crawford, Ohio, on February 13th, 20th, and 27th and March 4th, 1924, being

once a week for four successive weeks prior to the date of said sale;

Whereas, on March 14, 1924, pursuant to the terms of said decree of February 9, 1924, and pursuant to the notice of sale published as aforesaid, the said F. H. Wilson, duly appointed and acting Special Master for the sale of said properties did, at ten o'clock A.M. on said date and at the office of The Cleveland, Southwestern & Columbus Railway Company, 133 Court Street, in the City of Elyria, Lorain County, Ohio, offer for sale all of the properties of said The Cleveland, Southwestern & Columbus Railway Company described in said decree and in said notice and at said sale the properties were offered first singly in separate parcels and then as a whole, and John S. Fleek, being the highest qualified bidder, offered the sum of Four Million Six Hundred and Five Thousand Dollars ($4,605,000) for all of said properties as a whole; and

Whereas, such proceedings were had that on April 7th, 1924, said cause came on for hearing upon the report of F. H. Wilson, Special Master aforesaid, and upon the motion of The Guardian Savings & Trust Company, Trustee intervening petitioner, for the approval of said report and the confirmation of said sale, and on said date said District Court aforesaid did approve said report and confirm said sale and order the Special Master aforesaid to make conveyance of the properties so sold to the purchaser or his nominee; and

Whereas, the said John S. Fleek did, in writing, request that the said properties be conveyed to The Cleveland, Southwestern Railway & Light Company and the Court in said order of confirmation ordered and directed F. H. Wilson, Special Master as aforesaid, to make conveyance of all the properties of said The Cleveland, Southwestern & Columbus Railway Company to The Cleveland Southwestern Railway & Light Company and its successors and assigns; and

Whereas, The Cleveland, Southwestern Railway & Light Company has made payment to the Special Master of the purchase price aforesaid;

Now, Therefore, I, F. H. Wilson, duly appointed Special Master as aforesaid, by virtue of the powers and authority conferred upon me by law and by the orders of the District Court aforesaid, for the consideration of Four Million Six Hundred and Five Thousand Dollars ($4,605,000) received to my full satisfaction of The Cleveland Southwestern Railway & Light Company, the grantee, do hereby give, grant, bargain, sell and con-

vey unto the said The Cleveland Southwestern Railway & Light Company and its successors and assigns all of the following described properties, to-wit:

Parcel No. IV. The railroad lines of said Company in the Counties of Huron, Lorain and Erie, Ohio, between the following points, to-wit:

(b) Beginning at the corner of Main and College Streets in the Village of Oberlin, thence westerly on West College Street in the Village of Oberlin, .50 of a mile; thence westerly on private right of way to the easterly Village line of Berlin Heights, 13 miles; thence on Main Street and South Street to the southerly limits of the Village of Berlin Heights, .50 of a mile; thence on private right of way to the easterly limits of the City of Norwalk 8.80 miles;

Parcel No. IX. Situate in the City of Norwalk, County of Huron and State of Ohio and described as follows:

1—All that part of the East half of Great Lot 95, in Section 4, Norwalk Township, bounded on the north by the right of way of The Wheeling and Lake Erie Railroad Company; on the west by the west line of the east half of said Lot No. 95; on the south by the north line of a right of way sixty-six feet wide, running parallel with said railroad right of way and 132 feet (measured at right angles) distant therefrom, and on the east by a line running parallel with said west line of said east one-half of Lot 95 and 278.04 feet easterly therefrom.

Also a right in common with C. H. Gallup and Lizzie Gallup, their heirs and assigns, to said sixty-six foot right of way, viz.: a strip of land sixty-six feet wide running from Woodlawn Avenue on the east to the west line of said east half of lot No. 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said Wheeling and Lake Erie Railroad Company's right of way and running parallel therewith.

2—Also a leasehold of four by ten rods off the west end of said sixty-six foot strip, for description of land and extent of title leased, reference is hereby made to lease record Vol. 2, pages 12 and 13, Huron County, Ohio. And also all the gas and electric system of the Company, all its plants, gas-works, power stations, machinery, engines, boilers, dynamos, electric machines, gas machines, meters, lamps and other appliances, and apparatus, poles, lines, wires, pipes, lamp-posts, pipe-lines, tubing, gauges, cocks, valves, meter-testers, stop-boxes, transformers, switchboards and all other appliances, ap-

paratus and appurtenances, whether the same be now owned or hereafter acquired all of which things are hereby declared to be appurtenances and fixtures of said plants.

Parcel No. X. The railroad lines of said Company in the Counties of Medina, Wayne, Ashland, and Richland, Ohio, between the following points, to-wit:

(f) Being inlot No. 2020 in Outlot No. 2 in what is known as Feisinger's Addition to the City of Norwalk, as shown in deed recorded under date of October 27, 1902, Vol. 62, Page 438 Huron County Ohio Records.

(g) Being a strip of land 33 feet in width in Inlot No. 1, Section No. 3 of Norwalk Township, in City of Norwalk, as shown in deed recorded under date of January 14, 1902, Vol. 61, Page 69, Huron County Ohio Records.

Parcel No. XII. Consisting of the light and power business of The Cleveland Southwestern & Columbus Railway Company as operated by that Company and F. H. Wilson, Receiver thereof.

A. Complete detail in connection therewith is shown by schedule as filed with the Clerk of the District Court of the United States for the Northern District of Ohio, Eastern Division. Such light and power business includes:

Birmingham Section;

Approximately 5 miles of primary l[illegible]es and appurtenances 2300 volt distribution supplying consumers in and about the Villages of Birmingham, Wakeman and Kipton, together with the joint use of substations and high tension lines.

Milan Section;

Approximately 1 mile of primary lines and appurtenances 2300 volt distribution, supplying consumers in and about the unincorporated Village of Milan, together with the joint use of substations and high tension lines.

Norwalk Section;

Approximately 16 miles of primary lines and appurtenances 2300 volt distribution, supplying consumers in and about the City of Norwalk, together with the joint use of substations and high tension lines.

Such property and each such parcel includes therewith all stations, power houses, car barns and equipment of all kinds used on each such parcel in connection with the railway transportation carried on thereover, and all franchises, rights, contracts, powers, easements, licenses, buildings, erections, super-structures, machine shops, tools, implements and fixtures in respect to each such parcel.

To have and to hold all of said properties unto the said grantee, its successors and assigns, forever. Subject, however, to the liens, claims, and obligations which, pursuant to the said decree of February 9, 1924, the said purchaser is obligated to assume, but, except as above stated, forever free and discharged of and from the lien of and trusts under the several mortgages and deeds of trust hereinabove set forth, and the bonds and coupons secured thereby, and forever free and discharged of and from any and all liens, claims and demands whatsoever, arising out of any of the orders of the District Court aforesaid, or of any action of the said Receiver appointed in said cause, and forever free and discharged of and from any and all liens, claims and demands whatsoever upon or against said real and personal property, railways, rights, franchises, and other properties aforesaid, in favor of any party or parties to said cause, or in favor of any person or persons, firm or firms, corporation or corporations, claiming by, through or under them or any of them, and including all right, title, estate, interest and equity of redemption of said The Cleveland, Southwestern & Columbus Railway Company, its predecessors in title and of the Receiver herein, and of all of them, and of all persons claiming or to claim thereunder, to the said real and personal property railways, rights, franchises and other properties aforesaid and every part and parcel thereof. This conveyance is made as of March 1st, 1924. This conveyance is made in nine (9) counterparts for the purpose of record in the several counties in which the above property is located, each one of which shall be deemed to be an original. In witness whereof, I hereunto set my hand at Cleveland, Ohio, this 30 day of April, A. D. 1924.

F. H. Wilson,
Special Master as aforesaid

In the presence of:
C. E. McKisson
L. M. Miller

State of Ohio, Cuyahoga County, ss.

Personally appeared before me, the undersigned a Notary Public in and for said County and State, the above named F. H. Wilson, Special Master, who acknowledged that as such Special Master he did sign and seal the foregoing instrument and that the same is his free act and deed. In Testimony Whereof, I have hereunto set my hand and official seal at Cleveland, Ohio, this 30 day of April, A. D. 1924.

C. J. Mayers, Notary Public (Seal)

Note: Stamps required by Federal Law have been attached to an executed copy of this deed recorded in Cuyahoga County, Ohio.
Rec'd May 6, 1924, at 3:57 P.M.
Recorded May 14, 1924. Wm. G. Mitchell, Recorder.

Elyra, Ohio, Nov. 10, 1930.

I hereby certify that the foregoing is a true and correct copy of Deed of Special Master No. 151003—General Electric Co. vs. The Cleveland, Southwestern & Columbus Ry. Co., recorded in Vol. 198, Page 623 Lorain County Records of Deeds.

Given under my hand and Seal of Office the day and year first above written.

(Signed) Wm. G. Mitchell
Recorder Lorain County, Ohio.
(Seal) By C. J. Phelps, Deputy

PLAINTIFF'S EXHIBIT No. 27½

O.K. as to form—H. C. L., E. F. B.

#151004—The Cleveland Southwestern & Columbus Rail Way Company to The Cleveland Southwestern Railway & Light Company.

Know all men by these Present; That The Cleveland, Southwestern & Columbus Railway Company, a Corporation incorporated under the laws of the State of Ohio, the Grantor, for divers good causes and considerations thereunto moving, and especially for the sum of Ten Dollars ($10.00) received to its full satisfaction of The Cleveland Southwestern Railway & Light Company the Grantee, have given, granted, remised, released and forever quitclaimed and do by these presents absolutely give, grant, remise, release and forever quitclaim unto the said Grantee, its successors and assigns, forever, all such right and title as it the said Grantor has or ought to have in and

to the following described railroad rights of way, real estate, property, real and personal, and appurtenances, to-wit:

Parcel No. IV. The railroad lines of said Company in the Counties of Huron, Lorain and Erie, Ohio, between the following points, to-wit:

(b) Beginning at the corner of Main and College Streets in the Village of Oberlin, thence westerly on West College Street in the Village of Oberlin, .50 of a mile; thence Westerly on private right of way to the easterly village line of Berlin Heights, 13 miles; thence on Main Street and South Street to the southerly limits of the Village of Berlin Heights, .50 of a mile; thence on private right of way to the easterly limits of the City of Norwalk, 8.80 miles.

Parcel No. IX. Situated in the City of Norwalk, County of Huron and State of Ohio, and described as follows: 1—All that part of the East half of Great Lot 95, in Section 4, Norwalk Township, bounded on the north by the right of way of The Wheeling and Lake Erie Railroad Company; on the west by the west line of the east half of said Lot No. 95; on the south by the north line of a right of way sixty-six feet wide, running parallel with said railroad right of way and 132 feet (measured at right angles) distant therefrom, and on the east by a line running parallel with said west line of said east one-half of Lot 95 and 278.04 feet easterly therefrom.

Also a right in common with C. H. Gallup and Lizzie Gallup, their heirs and assigns, to said sixty-six foot right of way, viz: a strip of land sixty-six feet wide running from Woodlawn Avenue on the east to the west line of said east half of Lot No. 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said Wheeling and Like Erie Railroad Company's right of way and running parallel therewith.

2. Also a leasehold of four by ten rods off the west end of said sixty-six foot strip for description of land and extent of title leased, reference is hereby made to lease record, Vol. 2, pages 12 and 13, Huron County, Ohio. And also all the gas and electric system of the Company, all its plants, gas-works, power stations, machinery, engines, boilers, dynamos, electric machines, gas machines, meters, lamps, and other appliances and apparatus, poles, lines, wires, pipes, lamp-posts, pipe-lines, tubing, gauges, cocks, valves, meter-boxes, stop-boxes, transformers, switchboards, and all other appliances, apparatus and appurtenances, whether the same be now owned or here-

after acquired, all of which things are hereby declared to be appurtenances and fixtures of said plats.

Parcel No. XI. The following described real estate:

(f) Being Inlot No. 2020 in Outlot No. 2 in what is known as Feisinger's Addition to the City of Norwalk, as shown in deed recorded under date of October 27, 1902, Vol. 62, page 438 Huron County, Ohio, Records.

(g) Being a strip of land 33 feet in width in Inlot No. 1, Section No. 3 of Norwalk Township in City of Norwalk, as shown in deed recorded under date of January 14, 1902, Vol. 61, page 69, Huron County, Ohio, Records.

Parcel No. XII. Consisting of the light and power business of The Cleveland, Southwestern & Columbus Railway Company as operated by that Company and F. H. Wilson, Receiver thereof.

A. Complete detail in connection therewith is shown by schedule as filed with the Clerk of the District Court of the United States, for the Northern District of Ohio, Eastern Division. Such light and power business includes.

Birmingham Section:

Approximately 5 miles of primary lines and appurtenances 2300 volt distribution, supplying consumers in and about the Villages of Birmingham, Wakeman and Kipton, together with the joint use of substations and high tension lines.

Milan Section:

Approximately 1 mile of primary lines and appurtenances 2300 volt distribution, supplying consumers in and about the unincorporated Village of Milan, together with the joint use of substations and high tension lines.

Norwalk Section;

Approximately 16 miles of primary lines and appurtenances 2300 volt distribution, supplying consumers in and about the City of Norwalk, together with the joint use of substations and high tension lines.

Such property and each such parcel includes therewith all stations, power houses, car barns and equipment of all kinds used on each such parcel in connection with the railway transportation carried on thereover, and all franchises, rights, contracts, powers, easements, licenses, buildings, erections, super-structures, machine shops, tools, implements and fixtures in respect to each such parcel.

To have and to hold the premises aforesaid with the appurtenances thereunto belonging to the said Grantee, its successors and assigns so that neither the said Grantor nor its successors or assigns, nor any other persons claiming title through or under it, shall or will hereafter

claim or demand any right or title to the premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred. This deed is given in pursuance of an order of the District Court for the Northern District of Ohio, Eastern Division, in Cause No. 690 in Equity, in which General Electric Company et al is complainant and The Cleveland, Southwestern & Columbus Railway Company et al is defendant and of the decree of foreclosure entered in said suit February 9, 1924.

In Witness Whereof said corporation sets its hand and corporate seal by F. T. Pomeroy, its President and J. O. Wilson, its Secretary, this 15 day of April, A. D. 1924.

The Cleveland Southwestern & Columbus
(Seal) Railway Company
By F. T. Pomeroy, President
J. O. Wilson, Secretary.

Signed in the presence of:
B. R. Allen
G. Maxwell

The State of Ohio, Cuyahoga County, ss.

Before me, a Notary Public in and for said County personally appeared the above named The Cleveland, Southwestern & Columbus Railway Company by F. T. Pomeroy, its President and J. O. Wilson, its Secretary, who acknowledge that they did sign the foregoing instrument and that the same is the free act and deed of said corporation and the free act and deed of each of them personally and as such officers. In Testimony Whereof I have hereunto set my hand and official seal at Cleveland, Ohio, this 15 day of April 1924.

(Seal) C. J. Mayers, Notary Public.

Received May 6, 1924, at 3:58 P. M.
No transfer necessary May 6, 1924, M. H. Welty, Auditor.
Recorded May 16, 1924, Wm. G. Mitchell, Recorder.

Elyria, Ohio, Nov. 10, 1930.

This is to certify that the foregoing is a true and correct copy of Deed as found recorded in Deed Vol. 198 Page 630 of Lorain County Records.

Given under my hand and seal of office the day and year first above written.

(Signed) Wm. G. Mitchell
Wm. G. Mitchell, Recorder of
Lorain County, Ohio.
(Seal) By C. J. Phelps, Deputy.

PLAINTIFF'S EXHIBIT No. 28

OHIO ELECTRIC POWER COMPANY
To
THE SEABOARD NATIONAL BANK OF THE CITY OF NEW YORK
As Trustee

MORTGAGE AND DEED OF TRUST
Securing First Mortgage Gold Bonds
Dated July 1, 1924

Indenture, bearing date the first day of July, 1924, but actually executed the 2nd day of September, 1924, and made and entered into by and between Ohio Electric Power Company, a corporation of the State of Ohio, hereinafter sometimes called the Company, party of the first part, and The Seaboard National Bank of the City of New York, a corporation organized under The National Banking Laws of the United States of America and duly qualified to accept and execute the trust hereby created, hereinafter sometimes called the Trustee, as Trustee, party of the second part.

Whereas, the Company has deemed it necessary to borrow money for its corporate purposes and to issue its bonds therefor, and to mortgage and pledge its property, hereinafter described, to secure the payment of the same, said bonds to be issued in one or more series maturing at such dates and bearing interest at such rates respectively, and having such descriptive title, including therein the words "First Mortgage Gold Bond," as the Board of Directors of the Company, prior to the issue thereof may determine and as may be approved by the Trustee, such bonds to be coupon bonds, registerable or not registerable as to principal as the Board of Directors of the Company prior to the issue thereof may determine, with interest coupons attached with the fac-simile signature of the present or any future Treasurer of the Company thereon, and/or registered bonds without coupons, issuable as in this Indenture hereinafter provided; to be signed in its corporate name by its President or a Vice-President. impressed with its corporate seal, attested by its Secretary or an Assistant Secretary, and authenticated by the certificate of the Trustee; which said coupon bonds, coupons, registered bonds without coupons and Trustee's certificates are to be substantially in the forms following, respectively,—the proper amount, series and numbers, dates of issue, dates of maturity and

rates of interest to be inserted therein, and appropriate insertions, omissions and variations to be made in such bonds and coupons to express the terms and conditions upon which the same are to be redeemable before maturity (if so redeemable), to express the terms and conditions of exchangeability or interchangeability of the bonds to express the privilege of registration as to principal of such coupon bonds as may be so registerable as to principal, to express the covenants of the Company in regard to payment of taxes and in other respects to express the terms and conditions on which such bonds are issued as required or permitted by this Indenture:

* * * * *

Whereas the issuance of the bonds referred to in Section 1 of Article III of this Indenture and the lien and pledge hereby created have been duly authorized by an order duly entered by the Ohio Public Utilities Commission, and

Whereas, all things necessary to make said bonds, when duly authenticated by the Trustee, and issued by the Company, valid, binding and legal obligations of the Company, and to make this Indenture a valid, binding and legal instrument for the security thereof, have been done and performed and the issue of said bonds, as in this Indenture provided, has been in all respects duly authorized:

Now, therefore, this Indenture Witnesseth: Ohio Electric Power Company, in consideration of the premises and of one dollar to it duly paid by the Trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment both of the principal and interest of the bonds aforesaid, according to their tenor and effect, hath granted, bargained, sold, released, conveyed, assigned, transferred, pledged, set over and confirmed, and by these presents doth grant, bargain, sell, release, convey, assign, transfer, pledge, set over and confirm, unto The Seaboard National Bank of The City of New York, as Trustee, and to its successor or successors in said trust, and to it and its and their assigns forever, all the following described properties—that is to say:

I

The following real estate, viz.:

(Real estate descriptions are omitted. See Physical Exhibit No. 28, page 15.)

II

The following franchises:

(Descriptions of certain franchises are omitted. See Physical Exhibit No. 28, page 19.)

III

The electric generating plants of the Company, situate in the City of Ravenna, County of Portage, State of Ohio, and in the Village of Oberlin, County of Lorraine, State of Ohio, and the electric distributing systems of the Company situate in the cities, towns or communities and vicinity adjacent thereto known as Ravenna, Mantua and Oberlin, Ohio; also the gas plants and gas distributing systems of the Company in the City of Ravenna and in the Village of Oberlin; and any electric generating plants, electric distributing systems and distribution lines, and any gas plants and gas distributing systems and gas distributing mains hereafter constructed or acquired by the Company, and any additions to or extensions of any such present or future plants and systems, together with the buildings, erections, structures, transmission lines, sub-stations, engines, boilers, containers, pumps, turbines, pipes, mains, meters, machinery, conduits, insulators, dynamos, motors, lamps, wires, poles, appliances, instruments, apparatus, appurtenances, facilities and other property used or provided for use in the construction, maintenance, repair and operation thereof, both that now owned and that which may hereafter be acquired by the Company, and together also with all of the rights, privileges, rights of way, franchises, licenses, grants, liberties, immunities, ordinances, permits and easements of the Company, however conferred or acquired, whether now owned or hereafter acquired, with respect to the construction, maintenance, repair and operation of said plants, systems and lines, and any additions thereto and extensions thereof.

IV

The existing electric transmission lines of the Company and any such transmission lines hereafter constructed or acquired by the Company and any additions to or extensions of any such present or future transmission lines, together with the poles, wires, towers, crossarms, insulators, supports, buildings, erections, structures, transformers, stations, sub-stations, switchboard

equipment, telephone equipment, machinery, tools, apparatus, appliances, facilities and other property used or provided for use in the construction, maintenance, repair and operation thereof, both that now owned and that which may be hereafter acquired by the Company, and together also with all the rights, privileges, rights of way, franchises, licenses, easements, grants, liberties, immunities, permits, and ordinances of the Company with respect to the construction, maintenance, repair and operation of such existing and future transmission lines and each of them, and any additions thereto or extensions thereof, such existing transmission lines which the Company now owns being generally described as follows:

A 22,000 volt three phase transmission line from Ravenna to Brady's Lake;

A 13,200 volt three phase transmission line from Ravenna to Mantua;

Including all such transmission lines, whether or not herein particularly enumerated, without in any wise limiting or impairing by the enumeration of the same the scope and intent of the foregoing or of any general description contained in this Indenture.

V

All of the incomes, revenues, contributions, receipts, gas, electric, and other rents, returns, contracts (particularly including any and all contracts with any municipalities, individuals or corporations with respect to the supplying to such municipalities, individuals or corporations of gas and/or electricity for heat, light, power or any other purposes), leases, claims, accounts, demands, choses in action, books of account, bonds, shares of stock and contract rights of all kinds belonging to the Company and all stores, repair parts, materials and supplies except as hereinafter provided and subject to the rights reserved to the Company by other provisions of this Indenture.

All other property, real, personal and mixed (except merchandise held or to be held by the Company for the purpose of sale to its patrons and others), now owned or hereafter acquired by the Company and wheresoever situated, including (without in any wise limiting or impairing by the enumeration of the same the scope and intent of the foregoing or of any general description contained in this Indenture) all lands, rights of way, roads, all steam and power houses, buildings and other structures, and all offices, buildings and the con-

tents thereof; all machinery, engines, boilers, dynamos, regulators, meters, transformers, generators, motors, electrical and mechanical appliances, conduits, cables, gas, water, steam, heat or other pipes, pole and transmission lines, wires, cables, bridges, tracks, tools, implements, apparatus, supplies, merchandise, furniture, chattels, all municipal or other franchises; all lines for the transmission and distribution of electric current, steam heat, hot water, or gas for any purpose including poles, wires, cables, pipes, conduits and all apparatus for use in connection therewith; all real estate, lands, leases, leaseholds, heat or power contracts, street lighting contracts, easements, licenses, permits, franchises, privileges, rights of way and other rights in or relating to real estate or the occupancy of lands and the tolls, rents, revenues, issues, earnings, income and profits from any and all property of the Company.

Together with all and singular the tenements, hereditaments and appurtenances belonging or in any wise appertaining to the aforesaid property or any part thereof, with the reversion and reversions, remainder and remainders, tolls, rents, revenues, issues, income, product and profits thereof, and all the estate, right, title and interest and claim whatsoever, at law as well as in equity, which the Company now has or may hereafter acquire in and to the aforesaid property and franchises and every part and parcel thereof.

It is hereby agreed by the Company that all the property, rights and franchises acquired by the Company after the date hereof (other than merchandise held or to be held by the Company for the purpose of sale to its patrons and others) shall be as fully embraced within the lien hereof as if such property were now owned by the Company and were specifically described herein and conveyed hereby.

To have and to hold all said properties, real, personal and mixed, mortgaged, pledged or conveyed by the Company as aforesaid, or intended so to be, unto the Trustee and its successors and assigns forever; subject however to the right which the Company hereby reserves, until the happening of a completed default as set forth in Section 1 of Article XII hereof, to retain in its possession all cash, stocks, obligations, bonds and other securities owned by the Company, not expressly required by the provisions hereof to be deposited with the Trustee, and also bills and accounts receivable, damage claims and other claims for money, materials and supplies, and to sell, exchange, pledge, hypothecate or

otherwise dispose of the same free from the lien hereof, with the right and power from time to time to secure its notes or other obligations by the pledge, or deposit, or otherwise, of or with any or all of the said property so retained in its possession without let or hindrance on the part of the Trustee, or of any of the bondholders, and no person in any dealings with the Company in respect of any such property shall be charged with any notice or knowledge of any default under this Indenture while the Company is in possession of such property; and nothing herein contained shall be deemed or construed to require the deposit with the Trustee of any of such property, except such as is specifically required to be deposited with the Trustee by some express provision hereof.

In trust nevertheless, for the equal pro rata benefit and security of all and every of the bonds issued and to be issued hereunder in accordance with the provisions of this Indenture without preference, priority or distinction as to lien of any over the other by reason of priority in time of the issue, negotiation or maturity thereof; subject, however, to the provisions of this Indenture and of any supplemental indenture relating to any sinking fund for the benefit of the bonds of any particular series; it being intended that the lien and security of all of said bonds of all series issued or to be issued hereunder shall take effect from the execution and delivery of this Indenture, and that the lien and security of this Indenture shall take effect from the date of execution and delivery thereof as though all of the said bonds of all series were actually authenticated and delivered upon such date.

Provided, however, and these presents are upon the condition that if the Company, its successors or assigns, shall pay or cause to be paid unto the holders of said bonds the principal and interest to become due in respect thereof, at the times and in the manner stipulated therein and herein, and shall keep, perform and observe all and singular the covenants and promises in said bonds and in this Indenture expressed as to be kept, performed and observed by or on the part of the Company, then this Indenture and the estate and rights hereby granted, shall cease, determine and be void, otherwise to be and remain in full force and effect.

It is hereby covenanted, declared and agreed, by the Company, that all such bonds and coupons are to be issued, authenticated and delivered, and that all property subject or become subject hereto is to be held subject to the further covenants, conditions, uses and trusts

hereinafter set forth, and the Company, for itself and its successors and assigns, doth hereby covenant and agree to and with the Trustee and its successor or successors in said trust, for the benefit of those who shall hold said bonds and interest coupons, or any of them, as follows:

ARTICLE I

Definitions

Section 1. The terms specified in the next succeeding eight sections hereof, numbered from 2 to 9, both inclusive, shall, for all purposes of this Indenture (unless the context otherwise requires), have the meanings in such sections specified.

Section 2. The term "the Company" shall mean the party of the first part hereto, Ohio Electric Power Company, and shall also include its successors and assigns. The term "the Trustee" shall mean the party of the second part hereto, The Seaboard National Bank of The City of New York, and shall also include its successors and assigns. The terms "the lien hereof" and "the lien of this Indenture" shall mean the lien created by these presents (including the after-acquired property clauses hereof) and the lien created by any concurrent or subsequent conveyance to the Trustee hereunder (whether made by the Company or any other individual, copartnership or other corporation) effectively constituting any property a part of the security held by the Trustee upon the terms and trusts and subject to the conditions specified in this Indenture.

Section 3. The term "resolution" shall mean a resolution or a copy thereof, certified by the Secretary or an Assistant Secretary of the Company to have been duly adopted by the Board of Directors of the Company. The term "engineer" shall mean an individual or a copartnership or a corporation engaged in an engineering business. The term "engineer's certificate" shall mean a certificate signed and verified by the President or a Vice-President of the Company and by an engineer (who may be an employee of the Company) appointed by the Board of Directors of the Company and approved by the Trustee. The term "independent engineer's certificate" shall mean a certificate signed and verified by an engineer appointed either by the Trustee or by the Bankers and approved by the Board of Directors of the Company. The term "opinion of counsel" shall mean

an opinion in writing signed by legal counsel (who may be of counsel of the Company) appointed by the Board of Directors of the Company and approved by the Trustee. The term "Treasurer's certificate" shall mean a certificate signed and verified by the President or a Vice-President and Treasurer or an Assistant Treasurer of the Company.

Section 4. The term "permanent additions" shall mean lines, plants, properties, permanent improvements, extensions or additions, acquired or constructed, (a) by Oberlin Gas and Electric Company or Ravenna Gas and Electric Light Company subsequent to July 1, 1924 and prior to the conveyance of their respective properties to the Company, or (b) by the Company subsequent to the conveyances mentioned, in the preceding clause (a), and subjected to the lien of this Indenture, to be used in the business of producing, manufacturing, generating, supplying, selling or otherwise acquiring or disposing of (1) electricity, artificial gas, water, ice or steam, or light, heat or power, by means of electricity, gas, water or steam, and (2) with but not without the consent of the Bankers, transportation, telephone, telegraph or natural gas service by any means. Lines, plants, properties, permanent improvements, extensions or additions in process of construction or erection insofar as actually constructed or erected and paid for and, subjected to the lien of this Indenture, shall be deemed permanent additions. The term permanent additions shall not include (except as provided in subdivision (2) of Section 6 of Article V) any shares of stock, bonds or other securities or franchises, contracts or choses in action nor shall such term include any property acquired or constructed by the Company for the purpose of keeping or maintaining the mortgaged property in good and business-like working order and condition or merely to replace old, inadequate or worn-out property; provided, however, that whenever old, inadequate or worn-out property is replaced by property costing more than the reproductive value less depreciation of such old, inadequate or worn-out property as of July 1, 1924, or at time of acquisition if acquired thereafter, then to the extent of such excess, and to such extent only, such property so acquired to replace the old, inadequate or worn-out property shall be deemed permanent additions.

* * * * * *

Section 7. The term "Bankers" shall mean A. C. Allyn and Company, a corporation of the State of Delaware, and its successor or successors in business, so

long as the said corporation or its successor or successors shall continue in the business in which said corporation is now engaged, or until the said corporation or its successor or successors, by an instrument in writing filed with the Trustee, shall surrender its or their powers and duties under this Indenture. In either such event, all of the functions of the Bankers under this Indenture may be exercised by (1) the Trustee, or (2) by some person or persons (including a corporation or corporations) jointly appointed for that purpose by the Company and the Trustee. In respect of the exercise or failure to exercise any function of the Bankers hereunder, neither the Bankers nor the Trustee nor any such appointee shall under any circumstances incur any liability whatever, it being expressly understood that the Trustee shall be under no obligation in any event to exercise any power conferred hereby on the Bankers and that the exercise of any such power by the Trustee in any one event shall create no obligation on its part to exercise any such power in any other or further event.

Section 8. The term "cost" as applied to permanent additions, (as defined in Section 4 of this Article) shall mean and include the amount paid or expended in the acquisition, construction or erection thereof plus the amount of any obligations payable in money delivered by the Company or assumed or agreed to be paid by the Company in connection with the purchase, acquisition, construction or erection of the same, or subject to which the same is or may be so purchased, acquired, constructed or erected; provided that any such obligations once included in the cost of any permanent additions made the basis for the issuance of bonds or withdrawal of cash under any provision of this Indenture, may not thereafter be included in the cost of any other permanent additions. In the event that the Company shall at any time acquire any permanent additions in consideration, in whole or in part, of its own capital stock, the fair market value of such stock may, at the option of the Company, be included in the cost of such permanent additions, provided that the fair market value of any such stock shall be ascertained as hereinafter in this Section provided, within six months from the delivery thereof in consideration of or in exchange for such permanent additions. The fair market value of any such stock shall be ascertained as follows: The Trustee shall appoint one or more persons to be employed for that purpose by the Company but who shall not otherwise be in the employ of the Company, to determine the fair market value

of such stock on the date or dates of its delivery as hereinabove provided, which determination shall be evidenced by a certificate signed by such person or persons so appointed and filed with the Trustee, stating the fair market value of such stock in the opinion of such person or persons. Such certificate shall be conclusive evidence of the fair market value of such stock for all purposes of this Indenture.

Section 9. The term "outstanding" used with reference to the bonds issued under this Indenture, shall mean as of any particular time all bonds which have been theretofore authenticated and delivered hereunder and which have not been cancelled by the Trustee or surrendered to the Trustee for cancellation, except bonds which have been called for redemption and to the credit whereof sums have been placed as provided in Article X hereof, and except that in determining the bonds outstanding there shall not be included bonds at any time previously authenticated and delivered hereunder in lieu of and exchange and substitution for which any new bond has been authenticated and delivered, as provided in Section 15 of Article II of this Indenture.

ARTICLE II

Form and Execution Bonds

Section 1. This Indenture creates a continuing lien to secure the full and final payment of the principal and interest of all bonds which may from time to time be made, issued, authenticated and delivered hereunder. The amount of bonds which may be so made, issued, authenticated and delivered hereunder, is not limited except that no further bonds shall be issued at any time if the total amount of bonds to be outstanding, after such issue, would in any event exceed the then limit of indebtedness, if any, of the Company permitted by law.

At the option of the Company, the bonds issued hereunder may be issued in one or more series. All bonds issued hereunder of any one series shall be identical in form and language except for necessary or proper variations between coupon bonds and registered bonds without coupons or bonds of different denominations. Each series shall have such distinctive designation as the Board of Directors of the Company may select for such series, and each bond issued hereunder shall bear upon the face thereof the designation so selected for the series to which it belongs. All the bonds to be issued under

this Indenture, together with the coupons appertaining thereto, shall be expressed in the English language. The form of the bonds of each series, issued hereunder, other than the Series A mentioned in Section 2 of this Article, shall be established at the time of the creation of the Series by resolution of the Board of Directors of the Company, provided, however, that, subject to the exceptions contained in the fifteen next succeeding Sections of this Article numbered from 2 to 16, both inclusive, the text of the coupon bonds and of the registered bonds without coupons to be issued under this Indenture, and of the coupons appertaining to the coupon bonds, and of the certificate of the Trustee upon all bonds, shall be respectively substantially of the tenor and purport of the general forms of bonds above recited; and provided further that the bonds of any series both coupon and registered without coupons and the coupons to be attached to the coupon bonds may contain such other terms, provisions, specifications and descriptive words and may have such letters, numbers or other marks of identification or designation and such legends or endorsements printed, lithographed or engraved thereon not inconsistent with the provisions hereof as may be necessary or proper to comply with the rules of any brokers' board or exchange or with the order of any governmental body having jurisdiction in the premises, or to conform to usage with respect thereto or as may be desired by the Board of Directors of the Company. Before any bonds of any series other than the Series A hereinafter provided for in Section 2 of this Article shall be certified or delivered by the Trustee a certified copy of the resolution or resolutions creating the Series shall be deliverd by the Company to the Trustee. The Company shall also deliver to the Trustee a supplemental indenture in form to be recorded containing the particulars of the new series of bonds as above set forth and containing appropriate provisions giving to such bonds the protection and security of this mortgage.

Section 2. There shall be a series of bonds unlimited in amount designated 6½% Series A (herein referred to as "Series A"), which shall bear the descriptive title First Mortgage Gold Bond and the form thereof shall contain suitable provisions with respect to the matters hereinafter in this Section 2 specified. The coupon bonds of Series A and the coupons appertaining thereto shall be respectively substantially of the tenor and purport above recited. Bonds of said Series A shall mature July 1, 1944, and shall be issued as coupon bonds

in denominations of One Thousand Dollars ($1,000), Five Hundred Dollars ($500) and One Hundred Dollars ($100) and, at the option of the Company, as registered bonds without coupons in denominations of One Thousand Dollars ($1,000), and in any multiple or multiples of One Thousand Dollars ($1,000) that the Company may determine to issue.

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At the option of the Company, any coupon bonds of Series A in aggregate principal amount of $1,000, or any multiple thereof, upon surrender thereof with all unmatured coupons thereto appertaining at the office of the Trustee in the Borough of Manhattan, City of New York, may be exchanged for a like aggregate principal amount of registered bonds without coupons, of the same series. At the option of the Company, any registered bonds without coupons of Series A, upon surrender thereof at said office of the Trustee together with a written instrument of transfer in form approved by the Company duly executed by the registered holder, may be made exchangeable for a like aggregate principal amount of coupon bonds in denomination of $1,000 of the same series, with all unmatured coupons attached, or for a like principal amount of registered bonds without coupons of the same series of other authorized denominations.

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Section 10. Subject to the provisions of Section 2 of this Article with respect to the bonds of Series A, and of Section 8 of this Article the bonds of any series, at the option of the Company, may contain provisions permitting the exchange or interchange of bonds in any or all of the particulars hereinafter in this Section 10 specified, to wit: the exchange or interchange of coupon bonds for or with registered bonds without coupons; the exchange or interchange of registered bonds without coupons for or with coupon bonds; the exchange or interchange of coupon bonds for or with coupon bonds of other denomination or denominations; the exchange or interchange of registered bonds without coupons for or with registered bonds without coupons of other denomination or denominations; and the exchange of bonds of one series for bonds of another series of the same or later maturity. Such privileges of exchange or interchange may in any case be made subject to any conditions, limitations or restrictions which the Company shall cause to be specified in the bonds so made exchangeable or interchangeable and the privilege of exchange or interchange may in any case be conferred upon the

holders of bonds of one or more denominations and withheld from the holders of bonds of other denominations of the same series.

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ARTICLE III

Initial Issue of Bonds

Section 1. Bonds for the aggregate principal amount of Seven Hundred and Fifty Thousand Dollars ($750,000), being bonds of the Series A hereinbefore described, shall forthwith be executed by the Company and delivered to the Trustee and shall be authenticated by the Trustee, and delivered (whether before or after the filing or recording hereof), from time to time, in accordance with the order or orders of the Company, evidenced by a writing or writings signed by its President or a Vice-President and its Treasurer or an Assistant Treasurer.

ARTICLE IV

Provisions Applicable Generally to Issuance of All Additional Bonds

Section 1. No bonds, except as provided in Section 4 of Article V, in addition to those provided for in Article III hereof shall be authenticated and delivered hereunder by the Trustee unless the Trustee shall have received previous to or at the time of the authentication and delivery thereof;

(1) A written request or application dated not more than thirty days preceding the date of the authentication and delivery of bonds then applied for, executed in the name of the Company by the President or a Vice-President of the Company stating the principal amount, denomination and form (whether coupon or registered) of the bonds requested to be certified and delivered, the series thereof, and the person or persons to whom or upon whose order such bonds are to be delivered;

(2) A resolution as defined in Section 3 of Article I hereof authorizing such request or application;

(3) An opinion of counsel as defined in Section 3 of Article I, hereof, that no consent of any governmental authorities is requisite to the legal issue of the bonds the authentication and delivery of which have been applied for, or that the issue of such bonds has been duly authorized by the Company and by any and all govern-

mental authorities, the consent of which is requisite to the legal issue of such bonds, specifying any officially authenticated certificates or other documents by which such consent is or may be evidenced, and that all mortgage, registration and/or other like taxes in respect of the bonds applied for have been paid, or that provision for the payment thereof has been made or that no such payment is required by law; and

(4) The officially authenticated certificates or other documents, if any, specified in the opinion of counsel provided for in subdivision (3) above including evidence satisfactory to the Trustee of the payment or provision for payment of any taxes therein referred to.

(5) If the bonds, the authentication and delivery of which is applied for, are not a part of any series then existing the resolution or resolutions (as defined in Section 3 of Article I hereof) and the supplemental indenture creating the series of which such bonds are a part.

Section 3. No bonds in addition to those provided for in Article III hereof shall be authenticated and delivered hereunder by the Trustee at any time when the Trustee has knowledge that the Company is in default under any of the provisions of this Indenture.

ARTICLE V

Issuance of Bonds Upon the Basis of Permanent Additions

Section 1. Subject to the provisions of Sections 1 and 2 of Article IV bonds in addition to those provided for in any other section hereof may from time to time be executed by the Company and delivered to the Trustee and shall be authenticated and delivered by the Trustee upon the basis of the acquisition or construction of permanent additions as defined in Section 4 of Article I hereof. Such additional bonds, however, shall be authenticated and delivered only in accordance with and subject to the conditions, provisions and limitations set forth in the next succeeding seven sections of this Article numbered from 2 to 8, both inclusive.

Section 2. No bonds shall be authenticated and delivered at any time under the provisions of this Article V (other than those provided for in Section 4 of this Article) upon the basis of the acquisition or construction of (a) any property not included within the definition of "permanent additions" contained in Section 4 of Article I, or (b) any property which has not been or

is not simultaneously with the issuance of bonds applied for subjected to the lien hereof, or (c) any property which has previously been made the basis for the authentication and delivery of bonds or withdrawal of cash (unless such cash shall have been replaced under the provisions of Section 12 of Article XI hereof) under any provision of this Indenture, or (d) any property which has previously been made the basis for the withdrawal by the company from the trustee under any prior lien mortgage of any cash representing either insurance money received or the proceeds of property released from the lien of such prior lien mortgage subsequent to the time at which the property subject to such prior lien mortgage shall have been made the basis for the issuance of bonds or the withdrawal of cash hereunder, unless such cash so withdrawn from a trustee under a prior lien mortgage shall have been deposited with the Trustee hereunder, (e) any property which has previously been made the basis for the release of property under the provisions of Article XI hereof, or (f) any property with respect to which the Company shall have certified that it elects not to have any bonds authenticated hereunder upon the basis thereof, or (g) any substituted property acquired by the Company in the exercise by it of any right which it may have to apply the proceeds of property theretofore subject to the lien hereof or of any prior lien mortgage sold or taken by eminent domain, to the acquisition of such substituted property, without depositing such proceeds with the Trustee hereunder or with the trustee under any prior lien mortgage, or (h) any property used by the Company in lieu of the deposit of cash with the Trustee hereunder, or the trustee under any prior lien mortgage in the exercise of any right which the Company may have under any such mortgage to subject property to the lien thereof in lieu of the deposit of moneys otherwise required to be deposited with any such trustee in any fund, derived from insurance moneys or the release of property from the lien of any such mortgage; provided that any permanent additions as defined in Section 4 of Article I, hereof, included within the terms of clauses (e), (g) or (h) of this Section, acquired in exchange for or with the proceeds (including insurance money) of property not previously made the basis for the issuance of bonds hereunder, shall not be excluded by the provisions of this Section as a basis for the issuance of bonds.

Section 3. No bonds shall be authenticated and delivered under the provisions of this Article V (other than

those provided for in Section 4 of this Article) upon the basis of the acquisition or construction of any permanent additions until the cost of such permanent additions and the fair value thereof shall have been certified to the Trustee as hereinafter in Section 6 of this Article provided, and the Trustee shall not authenticate and deliver, under the provisions of this Article V (except as provided in Section 7 of this Article), bonds in principal amount exceeding 80% of the cost (which may include the principal amount of any prior liens required to be deducted from such 80% in accordance with the provisions of the next succeeding Section hereof) or the fair value, whichever is less (certified as aforesaid) of the permanent additions forming the basis of such authentication and delivery.

Section 4. In all cases in which it shall appear from the certificates hereinafter in Section 6 of this Article provided for, that permanent additions proposed to be made the basis for the authentication and delivery of bonds under the provisions of this Article V are subject in whole or in part to prior liens (as defined in Section 5 of Article I hereof), the principal amount of such prior liens shall be deducted from the amount of bonds which might otherwise be authenticated pursuant to the provisions of Section 3 of this Article, unless such certificates shall also show that such deduction has been made in respect of other permanent additions subject to the same prior liens theretofore made the basis of the authentication and delivery of bonds under this Article V, or the withdrawal of cash under any of the provisions of this Indenture, provided, however, that if at any time after the amount of any prior lien shall have been deducted, in accordance with the provisions of this Section, from the amount of bonds which might otherwise be authenticated and delivered hereunder, the Company shall either

(a) deposit with the Trustee any prior lien bond or prior lien bonds secured by such prior lien, to be held and dealt with by the Trustee in the manner and subject to the conditions and provisions set forth in Article IX hereof, or

(b) file with the Trustee a Treasurer's certificate (as defined in Section 3 of Article I) to the effect that such prior lien has been paid or reduced or ascertained by judicial determination or otherwise to be in whole or in part invalid, and specifying the amount of payment or reduction or the extent of the invalidity, as the case

may be, accompanied by a concurring opinion of counsel (as defined in Section 3 of Article I),
then, and in either such case, the Company shall be entitled to the authentication and delivery of further bonds to a principal amount equivalent to the principal amount of the prior lien bond or bonds so deposited with the Trustee, or (as the case may be) equivalent to the amount by which the principal amount of such prior lien shall be certified to have been paid off or reduced or ascertained to be invalid as aforesaid and the Trustee shall authenticate and deliver such bonds to or upon the order of the Company, anything herein contained to the contrary notwithstanding, provided (1) that the Company shall have duly delivered the notice required by Section 6 of Article IX of this Indenture and (2) that the Company shall have complied with the requirements of subdivisions (3) and (4) of Section 1 of Article IV, as to all bonds authenticated and delivered under this Section.

Section 5. No bonds shall be authenticated and delivered under this Article V (other than those provided for in Section 4 of this Article and except as otherwise provided in Section 7 of this Article) unless as shown by a net earnings certificate (as defined in Section 6 of Article I) the earnings applicable to bond interest for a period of twelve consecutive calendar months within the fifteen calendar months immediately preceding the date of any application for authentication and delivery of bonds shall have been in the aggregate at least equivalent to twice the actual interest requirements for a like period upon (a) all bonds outstanding hereunder on the date of such application, (b) the bonds applied for, and (c) all outstanding prior lien bonds on the date of such application.

Section 6. No application by the Company to the Trustee for the authentication and delivery of bonds under this Article V (other than those provided for in Section 4 of this Article) shall be granted by the Trustee, until the Trustee shall have received:

(1) The documents provided for in Section 1 of Article IV.

(2) An engineer's certificate (as defined in Section 3 of Article I) describing the permanent additions made the basis of the application in reasonable detail, stating that they are permanent additions, as defined in Section 4 of Article I, that they are desirable for use in the profitable conduct of the Company's business, and that they do not consist in whole or in part of properties

which under the provisions of Section 2 of this Article are not permitted to be made the basis of the authentication and delivery of bonds; and stating separately the cost and (except as to permanent additions of the character described in subdivision (3) of this Section) the then fair value of such permanent additions; and specifying the nature and extent of any prior liens (as defined in Section 5 of Article 1) existing upon any of the permanent additions and the amount thereof, and whether or not other permanent additions subject to the same prior liens have theretofore been made the basis of the authentication and delivery of bonds under this Article V, or the withdrawal of cash under any of the provisions of this Indenture, and stating what part, if any, of such permanent additions consists of property which has been used or operated by others than the Company in the public utility business or has not been constructed by or for the Company. Such certificate shall include and shall state that it includes all permanent additions, subject then and at the time of the acquisition thereof by the Company, to a lien which is or may become a prior lien, and which have not previously been made the basis for the issuance of bonds or the withdrawal of cash hereunder, and which have been constructed or acquired to some date specified in such certificate which date shall not be more than four months prior to the date of the application which such certificate accompanies. If any permanent additions included in any certificate provided for in this subdivision (2) of this Section 6 have been used or operated by others than the Company in the public utility business, the cost and/or fair value thereof upon the basis of which bonds may be authenticated under this Article V may include the cost and/or fair value of any rights and intangible property simultaneously acquired with the same, for which no separate or distinct consideration shall have been paid or apportioned.

(3) In case any permanent additions are shown by the engineer's certificate provided for in subdivision (2) above to consist of property which has been used or operated by others than the Company in the public utility business or which has not been constructed by or for the Company, a further and independent engineer's certificate (as defined in Section 3 of Article I) describing such property in reasonable detail, and stating the then fair value thereof for the purposes of the Company, and further containing a brief statement of the considera-

tions governing the signer's determination of the fair value thereof.

(4) A net earnings certificate (as defined in Section 6 or Article I), specifying the earnings applicable to bond interest for a period of twelve consecutive calendar months within the fifteen calendar months immediately preceding the date of the application for authentication and delivery of bonds and stating the aggregate principal amount of the outstanding bonds mentioned in subdivisions (a), (b) and (c) of Section 5 of this Article V.

(5) An opinion of counsel, as defined in Section 3 of Article I, specifying the instruments of conveyance, assignment and transfer necessary to vest in the Trustee, to hold as part of the mortgaged and pledged property hereunder, all the right title and interest of the Company in and to the permanent additions made the basis of the application, or stating that no such instruments are necessary for such purpose, and also stating the signers' opinion to the effect (a) that this Indenture is or upon the delivery of the instruments of conveyance, assignment or transfer mentioned in said opinion, will be a lien on the permanent additions (other than paving, grading and other improvements to public highways) forming the basis of such application, subject to no lien, charge or incumbrance thereon or affecting the title thereto, except taxes for the then current year and taxes and assessments not yet due, and prior liens as defined in Section 5 of Article I; (b) that the Company has corporate authority and all necessary permission from governmental authorities to own and, except as to properties for which the Company has no valid franchise, to operate the permanent additions in respect of which the application is made; (c) that the nature, extent and amount of prior liens, if any, mentioned in the accompanying engineer's certificate, are correctly stated.

(6) The instruments of conveyance, assignment and transfer, if any, specified in the opinion of counsel provided for in subdivision (5) above.

Section 7. At the time of making any application for the authentication and delivery of bonds upon the basis of permanent additions, as provided in this Article the Company may elect to limit the aggregate principal amount of bonds to be authenticated and delivered by the Trustee upon the basis of the permanent additions specified in the certificates accompanying such application to 75% of the cost or fair value thereof, whichever is less, instead of 80% thereof, as hereinbefore provided, and in that event, the earnings applicable to bond

interest computed in the manner and for the period specified in Section 5 of this Article need be in the aggregate only at least equivalent to one and three-quarter times the actual interest requirements for a like period upon the bonds mentioned in clauses (a), (b) and (c) of said Section 5 of this Article; and all certificates and other documents accompanying such application may contain such variations, omissions and insertions from the certificates and other documents provided for in Section 6 of this Article as may be appropriate to the conditions of the issuance of such bonds, in accordance with the provisions of this Section.

Section 8. In case at any time there shall be outstanding any indebtedness which is secured by a lien, prior to the lien of this Indenture, upon permanent additions, the Company may deposit with the Trustee, to be held, until used or applied as hereinafter provided, as a part of the mortgaged property, or with such other banking institution and in such other manner as shall be satisfactory to the Trustee, a sum of money sufficient (1) to pay the principal of said indebtedness and the interest thereon to its maturity, or (2) to effect the redemption of such indebtedness before maturity, if the same is subject to redemption, with interest to such redemption date. Upon any such deposit being made, said indebtedness shall, for all purposes of this Indenture except the application of said deposit as herein provided, be deemed to have been paid and shall not be deemed to be outstanding, provided, that in case of a deposit to effect a redemption a sufficient call for such redemption, or provision satisfactory to the Trustee for making such call, shall first be made. Any such money so deposited shall on the written request of the Company, be applied from time to time to the payment of the principal and interest or to the redemption of such indebtedness, or paid over to the Company proportionately as such indebtedness shall be acquired by the Company and be deposited with the Trustee as a part of the mortgaged property.

ARTICLE VI

Issuance of Bonds Upon Retirement of Bonds Previously Outstanding Hereunder

Section 1. The Company may from time to time issue and the Trustee shall authenticate and deliver, subject to the provisions of Sections 1 and 2 of Article IV, bonds hereby secured in addition to those provided for

in any other Section hereof, in an aggregate principal amount not exceeding the aggregate principal amount of any bonds previously issued hereunder which shall have been retired, provided that (a) no bond shall be issued in respect of any such retired bond more than one year prior to the regular maturity (by lapse of time and not by call for redemption) of such retired bond unless the bond so issued bears no greater rate of interest than such retired bond and (b) no bond shall be issued in respect of any such retired bond which shall have been retired (1) out of any sinking fund, maintenance and improvement fund, or other similar fund applicable to its retirement if the provisions establishing such fund prohibit such issuance, or (2) out of insurance moneys or the proceeds of released property or (3) out of cash deposited pursuant to the provisions of Article VII hereof. Any bond previously issued under this Indenture shall be deemed to have been retired if it shall have been paid or redeemed or surrendered to the Trustee and cancelled (unless such surrender shall have been made in exchange for another bond or bonds of the same series issued hereunder and evidencing the same indebtedness) or if the necessary money to effect its payment or redemption shall have been deposited for that purpose with the Trustee hereunder, and in the case of redemption if it shall have been called or provision satisfactory to the Trustee shall have been made for its call for payment on the redemption date.

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ARTICLE VIII

Particular Covenants of the Company

The Company hereby covenants as follows:

Section 1. That it is lawfully possessed of all the aforesaid mortgaged and pledged property; that it will maintain and preserve the lien of this Indenture so long as any of the bonds issued hereunder are outstanding; and that it has good right and lawful authority to mortgage and pledge the said mortgaged and pledged property, as provided in and by this Indenture; and that the same are free and clear of all liens and incumbrances except current taxes and except as otherwise provided herein.

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Section 6. The Company covenants that the business of the Company will be continuously carried on and con-

ducted in an efficient manner; that all property, plants, appliances and equipment of the Company useful in the carrying on of its business will be maintained in thorough repair, working order and condition, and, if worn out or injured, will be replaced by other property, suitable to the business of the Company, and of at least equal value; that it will make adequate provision for renewals and replacements of its property by setting up on its books and maintaining an adequate reserve for such renewals and replacements; and that none of the rights, franchises or privileges of the Company, whether now owned or hereafter acquired, will be allowed to lapse or be forfeited so long as the same shall be necessary for the carrying on of the business of the Company; that it will at all times maintain its corporate existence and right to carry on business in the several States in which its property and plants, or any part thereof, may be located, and will use reasonable efforts to obtain, from time to time, all necessary renewals and extensions thereof, and, subject to the provisions hereof, will diligently maintain, preserve and renew all rights, powers, privileges and franchises owned by it and necessary for the carrying on of the business of the Company; that it will at all times use all reasonable diligence to provide service adequate to meet the reasonable requirements of the communities in which it may be operating; that it will at no time commit or suffer to be committed, any waste upon the mortgaged property, or do, or permit to be done, about, in or upon the mortgaged property anything that may in any wise tend to impair the value thereof, or to weaken, diminish or impair the security furnished by this Indenture, and that it will fully and in due time comply with all laws and ordinances applicable to the Company or the mortgaged property.

Section 7. That if it shall fail to perform any of the covenants contatined in Sections 4, 5 and/or 6 of this Article the Trustee may make advances to perform the same in its behalf, but shall be under no obligations so to do; and all sums so advanced shall be at once repayable by the Company, and shall bear interest at six per centum (6%) per annum until paid, and shall be secured hereby, having the benefit of the lien hereby created in priority to the indebtedness evidenced by the bonds and coupons issued hereunder, but no such advance shall be deemed to relieve the Company from any default hereunder.

Section 8. That it will cause this Indenture and all indentures and instruments supplemental hereto to be

kept, recorded and filed in such manner and in such places as may be required by law in order fully to preserve and protect the security of the bondholders and all rights of the Trustee.

Section 9. That it will execute and deliver such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this Indenture, and to make subject to the lien hereof any property hereafter acquired and intended to be covered hereby, and to transfer to any new trustee or trustees the estate, powers, instruments or funds held in trust hereunder.

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Section 15. That it is duly authorized under the laws of the State of Ohio, and under all other applicable provisions of law to create and issue said bonds and to execute this Indenture covering the mortgaged and pledged property assigned and conveyed hereunder, and that all corporate action on its part for the creation and issue of said bonds and the execution of this Indenture has been duly and effectually taken, and that said bonds when issued in the hands of the holders thereof are and will be valid and enforcible obligations of the Company, and that this Indenture is and always will be a valid mortgage to secure the payment of said bonds.

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ARTICLE IX

Concerning Pledged Securities Deposited with the Trustee

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ARTICLE X

Redemption of Bonds

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Section 5. All bonds issued hereunder paid, retired or redeemed under any of the provisions of this Indenture shall forthwith be cancelled, and the Trustee shall thereupon deliver the bonds so cancelled to the Company.

ARTICLE XI

Possession, Use and Release of Mortgaged Property

Section 1. While not in default in the payment of principal or interest on any bond then outstanding hereunder or in respect of any of the covenants, agree-

ments or conditions in this Indenture contained, the Company shall be suffered and permitted to possess, use and enjoy the mortgaged and pledged property (except money and securities which are expressly required to be deposited with the Trustee), and to receive and use the rents, issues, income, product and profits thereof, with power, in the ordinary course of business, freely and without let or hindrance on the part of the Trustee or of the bondholders, to use and consume materials and supplies, and, except as herein otherwise expressly provided to the contrary, to exercise any and all rights under or in relation to choses in action and contracts.

Section 2. While the Company is not in default as aforesaid, it may at any time, without any release or consent by the Trustee, or accountability thereto for any consideration received by the Company,

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(3) surrender or assent to the modification of any franchise or governmental consent or permit under which it may be operating, provided that, in the event of any such surrender or modification, the Company shall still have, under some other franchise or governmental consent, permit or right or under the modified franchise or governmental consent, or under a new franchise, license, governmental consent or permit, received in exchange for the surrendered franchise or governmental consent or otherwise (subject to the lien of this Indenture and free from any liens prior thereto, except taxes for the then current year and prior liens as defined in Section 5 of Article I hereof and the lien of some other underlying mortgage), authority, in the opinion of counsel, to conduct the same or an extended business in the same or substantially the same or an extended territory for the same or substantially the same or an extended or unlimited period of time or until the maturity date of the last maturing series of bonds at the time outstanding hereunder.

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ARTICLE XII

Remedies of Trustee and Bondholders Upon Default

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Section 4. In the event of default of the Company in the performance of any of the covenants or conditions of this Indenture, the Trustee shall have the right and power to take appropriate judicial proceedings for the

enforcement of its rights and the rights of the bondholders hereunder. In case of a completed default hereunder, the Trustee may either after entry, or without entry, proceed by suit or suits at law or in equity to enforce payment of the bonds then outstanding hereunder and to foreclose this mortgage and to sell the property subject to the lien of this Indenture under the judgment or decree of a court of competent jurisdiction; and it shall be obligatory upon the Trustee to take action, either by such proceedings or by the exercise of its powers with respect to entry or sale, as it may determine, upon being requested so to do by the holders of twenty per centum (20%) in principal amount of the bonds then outstanding hereunder affected by such default and upon being indemnified as hereinafter provided.

No remedy by the terms of this Indenture conferred upon or reserved to the Trustee (or to the bondholders), is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to any other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

No delay or omission to exercise any right or power accruing upon any default, shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein; and every such right and power may be exercised from time to time and as often as may be deemed expedient.

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Section 14. All rights of action in favor of the Trustee arising under this Indenture, in respect of the bonds or coupons or otherwise may be enforced by the Trustee without the possession of any of the bonds or coupons or the production thereof on any trial or other proceedings relative thereto and any such suit or proceeding instituted by the Trustee shall be brought in its name as Trustee and any recovery of judgment shall be for the equal benefit of the owners and registered holders of the bonds and coupons.

Section 15. No holder of any bond or coupon shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this Indenture or for the execution of any trust hereof or for the appointment of a receiver or any other remedy hereunder, unless such holder shall have previously given to the Trustee written notice of such default and of the continuance thereof as hereinbefore provided nor unless also the holders of twenty per centum (20%) in prin-

cipal amount of the bonds then outstanding hereunder (or such other amount of bonds as is herein in certain instances expressly provided) shall have made written request to the Trustee and shall have afforded it reasonable opportunity to proceed to exercise the powers hereinbefore granted or to institute such action, suit or proceeding in its own name; nor unless they shall have offered to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared in every case at the option of the Trustee to be conditions precedent to the execution of the powers and trusts of this Indenture, and to any action or cause of action for foreclosure or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of the bonds or coupons shall have any right in any manner whatsoever to affect, disturb or prejudice the lien of this Indenture by his or their action or to enforce any right hereunder except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of outstanding bonds and coupons.

Nothing in this Section or elsewhere in this Indenture shall affect or impair the obligation of the Company which is unconditional and absolute to pay the principal of the bonds at their respective maturities as therein stated or upon due call for redemption as therein or herein provided and the interest thereon to such maturity to the respective holders thereof and of the coupons attached thereto, nor affect or impair the right of action which is absolute and unconditional of such holders to enforce such payment.

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ARTICLE XIII

Evidence of Rights of Bondholders and Ownership of Bonds

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ARTICLE XIV

Immunity of Subscribers to the Capital Stock, Stockholders, Office-Holders and Directors

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ARTICLE XV

Effect of Merger, Consolidation, Etc.

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ARTICLE XVI

Concerning the Trustee

Section 1. The Trustee accepts the trust hereby created but only upon the terms and conditions set forth in this Article.

Section 2. The recitals of fact herein and in the bonds issued hereunder contained, shall be taken as statements of the Company and shall not be construed as made by the Trustee. The Trustee makes no representations as to the value of any of the property subject to the lien of this Indenture or any part thereof, or as to the title of the Company thereto, or as to the security afforded thereby and hereby, or as to the validity of this Indenture or of the bonds or coupons issued hereunder, and the Trustee shall incur no responsibility in respect of such matters.

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Section 8. Upon any application for the authentication and delivery of bonds hereunder or for the payment of any moneys held by the Trustee under any provision of this Indenture, or for the execution of any release, or upon any other application to the Trustee hereunder, the resolutions, certificates, statements, opinions, reports and orders required by any of the provisions of this Indenture to be delivered to the Trustee as a condition of the granting of such application may be received by the Trustee as conclusive evidence of any fact or matter therein set forth and shall be full warrant, authority and protection to the Trustee in acting on the faith thereof, not only in respect of the facts but also in respect of the opinions therein set forth; and before granting any such application the Trustee shall not be bound to make any further investigation into the matters stated in any such resolution, certificate, statement, opinion, report or order, but if requested in writing so to do by the holders of not less than twenty per centum (20%) in principal amount of the outstanding bonds and only if furnished with adequate security and indemnity against the costs and expense of such examination, the Trustee shall make such further investigation as to it may seem proper; but it may in its discretion make any such independent in-

quiry or investigation as it may see fit. If the Trustee shall determine or shall be requested, as aforesaid, to make such further inquiry, it shall be entitled to examine the books, records and premises of the Company, either itself or by agent or attorney; and unless satisfied, with or without such examination, of the truth and accuracy of the matters stated in such resolutions, certificate, statement, opinion, report or order, it shall be under no obligation to grant the application. If after such examination or other inquiry the Trustee shall determine to grant the application it shall not be liable for any action taken in good faith. The reasonable expense of every such examination shall be paid by the Company, or if paid by the Trustee shall be repaid by the Company, upon demand, with interest at the rate of six per centum (6%) per annum, and until such repayment shall be secured by a lien on the mortgaged and pledged property and the proceeds thereof prior to the lien of the bonds and coupons issued hereunder.

* * * * *

Section 17. Any successor trustee appointed hereunder shall execute, acknowledge and deliver to its predecessor trustee, and also to the Company, an instrument accepting such appointment hereunder, and thereupon such successor trustee, without any further act, deed or conveyance shall become fully vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor in trust hereunder, with like effect as if originally named as Trustee herein; but the trustee ceasing to act, shall, nevertheless, on the written request of the Company, or of the successor trustee, but at the cost and expense of the Company, execute, acknowledge and deliver such instruments of conveyance and further assurance and do such other things as may reasonably be required for more fully and certainly vesting and confirming in such successor trustee all the right, title and interest of the Trustee, to which he or it succeeds, and to the mortgaged and pledged property and such rights, powers, trusts, duties and obligations, and the Trustee ceasing to act shall also, upon like request, pay over, assign and deliver to the successor trustee any money or other property subject to the lien of this mortgage, including the pledged securities, which may then be in his or its possession. Should any deed, conveyance or instrument in writing from the Company be required by the new trustee for more fully and certainly vesting in and confirming to such new trustee such estates, rights, powers and duties,

any and all such deeds, conveyances and instruments in writing shall, on request, be executed, acknowledged and delivered by the Company.

Section 18. Any company or bank into which the Trustee or any successor to it in the trusts created by this Indenture may be merged, or converted, or with which it or any successor to it may be consolidated, or any company or bank resulting from any merger, conversion or consolidation to which the Trustee or any successor to it shall be a party, shall be successor trustee under this Indenture without the execution or filing of any paper or any further act on the part of either of the parties hereto, anything herein contained to the contrary notwithstanding, provided such successor trustee shall be a corporation organized under the laws of the State of New York, or a national banking association, and shall have an office for the transaction of its business in the Borough of Manhattan, City of New York. In case any of the bonds issuable under this Indenture shall have been authenticated, but not delivered, any such successor trustee may adopt the certificate of authentication of The Seaboard National Bank of The City of New York, or of any successor to it, as trustee hereunder, and deliver the same so authenticated; and in case any of the bonds issuable hereunder shall not have been authenticated, any successor trustee may authenticate such bonds either in the name of any predecessor trustee or in the name of such successor trustee, and in all such cases such authentication shall have the full force and effect which anywhere in said bonds or in this Indenture it is provided that the authentication of the Trustee shall have; provided, however, that the right to authenticate bonds in the name of The Seaboard National Bank of The City of New York shall extend only to its immediate successor by conversion, merger or consolidation.

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ARTICLE XVII

Discharge of Mortgage

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ARTICLE XVIII

Meetings of Bondholders

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ARTICLE XIX

Miscellaneous

Section 3. The Company and the Trustee may from time to time and at any time if by the Company deemed necessary or advisable, enter into such indentures or agreements supplemental hereto as shall not be inconsistent with the terms and provisions hereof (which supplemental indentures or agreements shall thereafter form a part hereof) for one or more of the following purposes:

(a) To correct the description of any property hereby affected or pledged or intended so to be; to assign, convey, mortgage, pledge, transfer and set over unto the Trustee, subject to such liens or other incumbrances as shall be therein specifically described, additional property or properties of the Company for the equal and proportionate benefit and security of the holders of all bonds at any time issued and outstanding under this Indenture, subject, however, to any provision of this Indenture or of any indenture or agreement supplemental hereto, relating to a sinking fund for the benefit of the bonds of any particular series.

(b) To provide the terms and conditions of the issue of the bonds of any series not expressly provided for in this Indenture.

(c) To provide the terms and conditions of the exchange of bonds of one series for bonds of another or other series.

(d) To provide that the principal of the bonds of any particular series may be converted at the option of the holders into the capital stock of the Company, or into any other security whatsoever and the terms and conditions of such conversion.

(e) To evidence the succession of another corporation to the Company or successive successors and the assumption by such successor corporation of the covenants and obligations of the Company under this Indenture.

(f) To comply with the provisions or perform the covenants contained in Section 9 of Article VIII, Section 9 of Article XVIII, or Section 2 of this Article hereof.

(g) For any other purpose not inconsistent with the terms of this Indenture or for the purpose of curing any ambiguity or defective provisions contained herein, or in any supplemental indenture.

Section 4. The terms and conditions contained in any supplemental indenture or agreement as to any provisions authorized to be contained herein under paragraphs (b), (c) and (d) of the next preceding Section may, if deemed necessary or advisable by the Trustee, be set forth in reasonable and customary manner in the bonds of the particular series to which said supplemental indenture or agreement shall apply. In case of the execution and delivery of any supplemental indenture or agreement, express reference may be made thereto in the text of the bonds of any series issued hereunder, if deemed necessary or advisable by the Trustee.

Section 5. Whenever in this Indenture either of the parties hereto is named or referred to, this shall be deemed to include the successors or assigns of such party, and all the covenants and agreements in this Indenture contained by or on behalf of the Company or by or on behalf of the Trustee shall bind and enure to the benefit of the respective successors and assigns of such parties whether so expressed or not.

The descriptive headings of the several Articles of this mortgage were formulated, used and inserted in this mortgage for convenience only and shall not be deemed to affect the meaning or construction of any of the provisions hereof.

Section 6. This Indenture shall be simultaneously executed in several counterparts, and all said counterparts executed and delivered, each as an original, shall constitute but one and the same instrument.

The amount which at the time of the delivery of this Indenture has been advanced or accrued thereon, or is at that time secured hereby, does not exceed the sum of $750,000 with interest thereon from July 1, 1924, at the rate of 6½% per annum.

In witness whereof, Ohio Electric Power Company, party hereto of the first part, has caused its corporate name and seal to be hereunto affixed, and this instrument to be signed by its President or a Vice-President, and attested by its Secretary or an Assistant Secretary for and in its behalf, and The Seaboard National Bank of The City of New York, party hereto of the second part, in token of its acceptance of the trust hereby created, has caused its corporate name and seal to be hereunto affixed, and this instrument to be signed by its President or a Vice-President and attested by its Cashier

or an Assistant Cashier, all in the City of New York, as of the day and year first above written.

Ohio Electric Power Company,
By Victor Emanuel,
Vice-President.

(Seal)

Attest:
Floyd E. Harper,
Assistant Secretary.

In the presence of:
W. R. Porter,
W. L. O'Conor.

The Seaboard National Bank of the City of New York,
By C. D. Makepeace,
Vice-President.

(Seal)

Attest:
F. R. Parkin,
Assistant Cashier.

In the presence of:
E. V. Nelson,
C. L. Clune.

State of New York, County of New York, ss.:

On this second day of September, 1924, before the subscriber, a Commissioner of the State of Ohio in and for the State of New York, personally came Victor Emanuel, who is the Vice-President of the said Ohio Electric Power Company, and acknowledged that the name of said Company was subscribed to the foregoing Indenture by himself as the Vice-President thereof; and that the seal affixed thereto is the seal of said Company, and that said name was subscribed and said seal attached to the foregoing Indenture by the direction and authority of the said Company, and that the foregoing Indenture is the act and deed of the Ohio Electric Power Company for the uses and purposes therein mentioned.

Witness my hand and official seal this 2nd day of September, 1924.

Ella F. Braman
Commissioner for the State of Ohio, in and for the State of New York, resident in the City of New York.

(Seal) Commission expires May 16, 1925.

State of New York, County of New York, ss.:

On this second day of September, 1924, before the subscriber, a Commissioner of the State of Ohio in and for the State of New York, personally came C. D. Makepeace, who is the Vice-President of the said The Sea-

board National Bank of the City of New York, and acknowledged that the name of said Company was subscribed to the foregoing Indenture by himself as the Vice-President thereof and that the seal affixed thereto is the seal of said Company, and that said name was subscribed and said seal attached to the foregoing Indenture by the direction and authority of said Company, and that the foregoing Indenture is the act and deed of the said The Seaboard National Bank of the City of New York, for the uses and purposes therein mentioned.

Witness my hand and official seal this 2nd day of September, 1924.

Ella F. Braman
Commissioner for the State of Ohio, in and for the State of New York, resident in the City of New York.
(Seal) Commission expires May 16, 1925.

Original Mortgage endorsed as follows:
Received For Record
Sep 5-1924
At 8:35 o'clock A.M.
Recorded 192
(in Lorrain County) Mtg. Records
Volume 162 Page
Wm. G. Mitchell,
Recorder.
Received For Record
September 6, 1924
at 11:45 o'clock A.M.
Recorded 19
In Portage County Records
Of
Vol. 281 Page
A. B. Lozier,
Recorder.

I hereby certify that the above and foregoing is a true and correct copy of the Mortgage and Deed of Trust given by Ohio Electric Power Company to The Seaboard National Bank of the City of New York as Trustee as the same appears on the records of this office, being recorded in Mortgage Record Volume 95, pages 41-74 inclusive.

In Testimony Whereof, I have hereunto set my hand and official seal at Norwalk, Huron County, Ohio, this 7th day of November, A. D. 1930.

Will H. Darling,
(Seal) County Recorder.
By Maudie Eaton, Deputy.

PLAINTIFF'S EXHIBIT No. 29
(Filed for Record June 19, 1925)

OHIO ELECTRIC POWER COMPANY
to
THE SEABOARD NATIONAL BANK OF THE CITY OF NEW YORK
As Trustee

SUPPLEMENTAL MORTGAGE
to
MORTGAGE AND DEED OF TRUST

Securing First Mortgage Gold Bonds

Dated May 25, 1925

Indenture, bearing date the 25th day of May, 1925, but actually executed on the 29th day of May, 1925, made and entered into by and between Ohio Electric Power Company, a corporation of the State of Ohio (hereinafter sometimes called the Company), party of the first part, and The Seaboard National Bank of the City of New York, a corporation organized under the National Banking Laws of the United States of America (hereinafter sometimes called the Trustee), as Trustee, party of the second part.

Whereas, the Company heretofore duly made, executed and delivered to the Trustee its Mortgage and Deed of Trust bearing date the 1st day of July, 1924, but actually executed on the 2nd day of September, 1924 (hereinafter referred to as the Original Mortgage), securing an issue of First Mortgage Gold Bonds of the Company unlimited in amount and conveying and transferring to the Trustee the property and rights therein mentioned and described, which Original Mortgage was duly recorded in the office of the Recorder of Deeds of Lorain County, Ohio, on September 5, 1924, in Mortgage Records, Volume 162, page , and in the office of the Recorder of Deeds of Portage County, Ohio, on September 6, 1924, in Portage County Records, Volume 281, page , and which said Original Mortgage is intended to be filed for record in the office of the Recorder of Deeds in Erie County, Ohio, and in the office of the Recorder of Deeds in Huron County, Ohio, contemporaneously with the filing therein of this Indenture, and which said Original Mortgage was duly made, executed and delivered for the purpose of securing the payment of series of bonds of the Company as therein provided, and

Whereas, the Company covenanted in and by said Original Mortgage to execute and deliver such further instruments and do such further acts as might be necessary or proper to carry out more effectually the purposes of the said Original Mortgage, and to make subject to the lien thereof any property thereafter acquired and intended to be covered thereby, and

Whereas, the Company since the execution of said Original Mortgage has acquired certain additional property hereinafter described or mentioned, and

Whereas, the execution and delivery of this Supplemental Mortgage has been duly authorized by the Board of Directors of the Company at a meeting thereof duly convened and held, and all acts and things prescribed by law to make this Indenture a valid and lawful Supplemental Mortgage to the Original Mortgage have been done and performed, all in accordance with the Charter or Certificate of Incorporation and Regulations and By-Laws of the Company and all Laws and Statutes relating thereto.

Now, Therefore, This Indenture Witnesseth:

That the Company in consideration of the premises and of One ($1) Dollar to it duly paid by the Trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to further secure the payment of the principal and interest of the bonds issued under and secured by said Original Mortgage and this Supplemental Mortgage, according to their tenor and effect, and the performance and observance of all and singular the covenants and promises in all said bonds and in said Original Mortgage and in this Supplemental Mortgage expressed, and in order more effectually to carry out the purposes of said Original Mortgage and this Supplemental Mortgage, hath granted, bargained, sold, released, conveyed, assigned, transferred, pledged, set over and confirmed, and by these presents doth grant, bargain, sell, release, convey, assign, transfer, pledge, set over and confirm unto The Seaboard National Bank of the City of New York, as Trustee, and to its successor or successors in said trust, and to it and its, and their assigns, forever, all property and assets, real, personal or mixed, tangible or intangible, of whatsoever kind or nature and wheresoever situate, conveyed, transferred or assigned to the Company by Victor Emanuel, by two certain quitclaim deeds, each dated May 22, 1925, and by deed of assignment, dated May 22, 1925, and by bill of sale dated May 22, 1925, and by assignment dated May 22, 1925 (excepting, however, any merchan-

dise so acquired from said Victor Emanuel and held or to be held by the Company for the purpose of sale to its patrons and others) together with all lands and the buildings and improvements thereon and the appurtenances thereto, all easements and all other rights in or relating to real estate or the occupancy of private or publicly owned lands, and all power plants and other plants, machinery, engines, boilers, dynamos, electric machines, regulators, meters, transformers, generators, motors, electric and mechanical appliances, cables, wires, poles, crossarms, insulators, transmission lines, distribution systems, mains, pipes, standpipes, conduits, water systems, tools, stores, materials and supplies, furniture and fixtures, and all leaseholds, licenses, permits, privileges, and all contracts and choses in action and all books of account, and the tolls, rents, revenues, issues, earnings, income and profits therefrom so conveyed, transferred or assigned to the Company by the above mentioned Victor Emanuel, as aforesaid, and including, without in any wise limiting or impairing by the enumeration of the same the scope or intent of the foregoing or of any general description contained in this Supplemental Mortgage, the following:

(1) A parcel of real property located in the City of Norwalk, County of Huron, and State of Ohio, together with the buildings and improvements thereon erected, formerly belonging to the Cleveland Southwestern Railway and Light Company, and described in a Deed dated December 31, 1924, from said Cleveland Southwestern Railway and Light Company to Victor Emanuel as follows:

1. All that part of the east half of Great Lot No. 95 in Section 4 Norwalk Township, bounded on the north by the right of way of The Wheeling & Lake Erie Railroad Company, on the West by the west line of the east half of said lot No. 95; on the South by the north line of a right of way sixty-six feet wide running parallel with said Railroad right of way and 132 feet (measured at right angles) distant therefrom, and on the east by a line running parallel with said west line of said east one-half of lot 95 and 278.04 feet easterly therefrom. Also a right in common with C. H. Gallup and Lizzie F. Gallup, their heirs and assigns to said sixty six foot right of way, viz: A strip of land sixty six feet wide running from Woodlawn Avenue on the east to the west line of said east half of Lot No. 95 on the west, the north boundary line of said strip of land being distant (measured at right angles) 132 feet from the south line of said

Wheeling & Lake Erie Railroad Company's right of way and running parallel therewith.

2. Also a leasehold of four by ten rods off the West end of said sixty six foot strip, for description of land and extent of title leased, reference is hereby made to lease record Vol. 2, pages 12 and 13, Huron County, Ohio.

(2) A parcel of real property near the Village of Birmingham, Florence Township, Erie County, Ohio, formerly belonging to the Cleveland Southwestern Railway and Light Company, and described in a Deed dated December 31, 1924, from said Cleveland Southwestern Railway and Light Company to Victor Emanuel, as follows:

Situated in the Township of Florence, County of Erie and State of Ohio, and known as being a part of Township lot No. 94 and bounded and described as follows: Beginning at a point in the East line of land deeded by E. Henry to the Cleveland, Elyria and Western Railway Company for a substation, which point is 558 feet South of the Southeast corner of Public School Ground; thence South 8° 50′ east one hundred forty-seven (147) feet to said Henry's East line; thence South 35′ East along said East line fourteen (14) feet to the northerly line of land deeded by E. Henry to the Cleveland, Elyria and Western Railway Company for right of way; thence North-westerly along said right of way one hundred thirty-eight feet to the East line of substation ground; thence along the East line of substation ground North 12′ West thirty-one (31) feet to the point of beginning.

(3) A certain transmission line and distribution systems and personal property formerly belonging to the Cleveland Southwestern Railway and Light Company described in a bill of sale dated the 31st day of December, 1924, from said Cleveland Southwestern Railway and Light Company, to Victor Emanuel as follows:

(a) That certain three phase high tension line, poles and equipment therefor between the power house and substation in the City of Norwalk of the Grantor and the point of intersection of the Elyria-Oberlin Road, and East Lorain Street in the Village of Oberlin extended, east of Oberlin.

(b) That certain three phase high tension line, poles and equipment therefor, extending from the high tension line hereinbefore described in Paragraph (a) hereof, to the Oberlin Water Works in the Village of Oberlin, together also with all substation equipment in connection therewith of the Grantor in the City of Ober-

lin, said equipment including all articles of personal property and all appurtenances in and to said high tension line mentioned in this paragraph.

(c) All primary and secondary light lines of the Grantor located on the poles referred to in Paragraphs (a) and (b) hereof and/or used in connection with the power and light business of the Grantor, including (1) approximately 3.9 miles of line between the city limits of the City of Norwalk and Stop 35 upon the Electric Interurban Railroad of the Grantor and (2) Line from point of connection with said high tension line described in Paragraph (a) hereof to and in the Village of Kipton, Ohio, and including all distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto, or used in connection therewith of the Grantor, within said Village of Kipton.

(d) All distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the Grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines and poles of the Grantor, approximately 5.2 miles of lines on poles of others than the Grantor and approximately 4.3 miles of lines on poles owned jointly by the Grantor and others, together with all right, title and interest of the Grantor in and to the poles so occupied jointly.

(e) All equipment, material, appurtenances of the Grantor in and to the Power House and Substation of the Grantor in the City of Norwalk, Ohio, including boilers, engines, frequency changer, transformers, oil switches, metering equipment, rotary converter.

Also all switching equipment, transformers, appurtenances and other equipment in connection with said three phase high tension line mentioned in Paragraph (a) hereof and located in the Railroad Station of the Grantor in the Village of Birmingham, Ohio, and used in connection with the commercial power and light business of the Grantor.

(f) That certain three phase high tension wire, cross arms, pins and insullators between the point of intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin extended, east of Oberlin, referred to in Paragraph (a) and the point on the right of way of the Electric Interurban Railway of the Grantor where the Polk High Tension Line of the Grantor so-called, intersects said railway right of way and the pole line in connection therewith at Stop 100 on said right of way, more commonly known as Wask's Cheese Factory.

(g) That certain three phase high tension wire, pins and insullators located on the north side of poles of the Grantor between said Stop 100 referred to in Paragraph (f) hereof and the west property line of the car shops of the Grantor in the City of Elyria, Ohio.

(4) A certain right of way formerly belonging to the Cleveland Southwestern Railway and Light Company and described in a deed of assignment dated the 31st day of December, 1924, from said Cleveland Southwestern Railway and Light Company, to Victor Emanuel, as follows:

That certain right of way upon which to erect and maintain poles for the purpose of carrying electric, feed and other wires, commencing in the County of Lorain, State of Ohio, Township of Russia at or near the intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin extended, east of Oberlin; thence in a westerly direction through said township of Russia, County of Lorain; thence northwesterly through the Township of Henrietta in said County, to the Village of Birmingham Florence Township, Erie County, State of Ohio; thence westerly through said Florence Township and Berlin Township of said Erie County to the Village of Berlin Heights in said Township; thence southwesterly through said Township and through the Township of Milan in said County; thence southwesterly through the Township of Norwalk, Huron County, State of Ohio to the Easterly limits of the City of Norwalk, Huron County, State of Ohio; thence over and across streets and ways in the City of Norwalk to the Sub-station and Power House of the Grantor in said City;

Said right of way for the maintenance of the pole line as aforesaid and as herein granted, being all the right, title and interest of the Grantor in and to its right of way or easement for the construction and maintenance of the pole line now owned by the Grantor, and extending between the points hereinbefore set forth and having been acquired by the Grantor, or its predecessors in title by grant of easement, appropriation proceedings, contract, license and franchise.

(5) Certain contracts, rights, franchises and privileges formerly belonging to the Cleveland Southwestern Railway and Light Company described in an assignment dated the 31st day of December, 1924, from the Cleveland Southwestern Railway and Light Company to Victor Emanuel, as follows:

(a) Contract between the Village of Oberlin, County

of Lorain and State of Ohio, party of the first part, and the Cleveland Southwestern and Columbus Railway Company, party of the second part, dated November 29, 1919, approved by Ordinance of the Council of the Village of Oberlin, County of Lorain, Ohio, August 19, 1919, which said contract was duly assigned to The Cleveland Southwestern Railway and Light Company, Grantor herein, by said Cleveland Southwestern & Columbus Railway Company and F. H. Wilson, Special Master thereof, by assignment dated April 15th, 1924, which contract is attached hereto and marked Exhibit "A".

(b) Contract between the Farmers Electric Power and Light Company and The Cleveland Southwestern Railway and Light Company dated October 8, 1924, attached hereto and marked Exhibit "B".

(c) Contract by and between The Wakeman & Butler Road Electric Company, Ltd., an Ohio corporation and The Cleveland Southwestern Railway and Light Company dated October 15, 1924, attached hereto and marked Exhibit "C".

(d) Contract between The Cleveland Southwestern & Columbus Railway Company and the Mutual Power and Light Company, an Ohio Corporation; dated March 15, 1919, which contract was assigned by the Cleveland Southwestern & Columbus Railway Company and F. H. Wilson, Special Master thereof, to the Grantor herein by assignment dated April 15th, 1924, which contract is attached hereto and marked Exhibit "D", together with Supplemental Agreement by and between said The Cleveland Southwestern & Columbus Railway Company and said The Mutual Light and Power Company dated October 16, 1923, and assigned to the Grantor herein by said assignment dated April 15th, 1924, said contract and said supplemental agreement being attached hereto and marked Exhibit "D".

(e) Agreement by and between certain persons designated as owners and using electric current for power, heat and light, and F. H. Wilson, Receiver of The Cleveland Southwestern & Columbus Railway Company dated October 25, 1922, and contracting with respect to a certain pole line running from Birmingham, Florence Township, Erie County, Ohio, to Kipton, Ohio, which contract is duly assigned by said F. H. Wilson, Special Master, to the Grantor herein by said assignment dated April 15th, 1924. Said agreement is attached hereto and marked Exhibit "E".

(f) Agreement between The Norwalk Gas and Electric Company and The Cleveland Southwestern Traction

Company dated February 14, 1903, together with certified abstract from the records of the City of Norwalk, Ohio, recorded in Council Journal Volume 7, Pages 65-75, consenting to such agreement, which agreement and the rights thereunder of said The Cleveland Southwestern Traction Company were transferred to The Cleveland Southwestern & Columbus Railway Company, successor to said The Cleveland and Southwestern Traction Company, and which agreement was duly assigned to The Cleveland Southwestern Railway and Light Company by said The Cleveland Southwestern & Columbus Railway Company and F. H. Wilson, Special Master thereof, by assignment dated April 15th, 1924. Said agreement and consent of the City of Norwalk are attached hereto and marked Exhibit "F". Together, also, with all contracts, franchises, grants, rights and privileges which the Grantor has or may have in the City of Norwalk, Ohio, in connection with the conduct of an electric light, heat and power business in said city.

(g) Agreement between certain owners desirous of securing electric current for power, light and heat, and F. H. Wilson, Receiver of The Cleveland Southwestern & Columbus Railway Company dated March 4, 1922, and assigned by said F. H. Wilson, Special Master aforesaid to The Cleveland Southwestern Railway and Light Company by assignment dated April 15, 1924. Said agreement is attached hereto and marked Exhibit "G".

(h) Together also with all contracts or agreements of the Grantor for the furnishing of light, heat and power from the certain three phase high tension lines of the Grantor assigned, transferred and conveyed to the Grantee by Bill of Sale dated December 31, 1924, and extending from the west property line of the Elyria Car Barns of the Grantor to the City of Norwalk; and any such contracts or agreements in the corporate limits of the Village of Oberlin, Ohio, and also all such contracts, franchises, rights, privileges and agreements of the grantor in the City of Norwalk, Ohio.

To Have and to Hold all said properties real, personal and mixed hereby mortgaged, pledged or conveyed, or intended so to be, unto the Trustee, its successors and assigns forever, subject as aforesaid.

In trust, nevertheless, for the equal and pro rata benefit and security of all and every of the bonds issued and to be issued hereunder and under said Original Mortgage, in accordance with the provisions thereof, without preference, priority or distinction as to lien of any over the others by reason of priority in time of the issue,

negotiation or maturity thereof; subject however, to the provisions of the said Original Mortgage and any Supplemental Indenture relating to any sinking fund for the benefit of the bonds of any particular series; and subject to the same conditions, provisions and covenants as are set forth in said Original Mortgage (and particularly as to all cash, stocks, obligations, bonds, and other securities not expressly required by the provisions of the Original Mortgage to be deposited with the Trustee, and also as to all bills and accounts receivable, damage claims and other claims for money, materials and supplies, to the rights reserved to the Company in the habendum clause of said Original Mortgage), to the same extent and with the same effect as if the property herein described and conveyed or assigned had been owned by the Company at the time of the execution of said Original Mortgage and had been specifically described therein and conveyed to the Trustee thereby and, it is hereby covenanted and agreed by and between the parties hereto that all of the terms, trusts, conditions, covenants and provisions contained in said Original Mortgage shall affect and apply to the property hereby conveyed or assigned to the same extent and with the same effect as if said property had been owned by the Company at the time of the execution of said Original Mortgage, and had been specifically described or mentioned therein and conveyed or assigned to the Trustee thereby.

Section 1. It is understood and agreed that this Supplemental Mortgage shall be construed in connection with and as a part of the Original Mortgage and that the covenants and provisions hereof shall be deemed as covenants and provisions of said Original Mortgage.

Section 2. The recitals of fact herein contained shall be taken as statements of the Company and shall not be construed as made by the Trustee. The Trustee makes no representations as to the value of any of the property described or mentioned in this Supplemental Mortgage or any part thereof, or as to the title of the Company thereto or as to the security afforded thereby and hereby or as to the validity of this Supplemental Mortgage or of the bonds or coupons issued hereunder and the Trustee shall incur no responsibility in respect of such matters.

The Trustee accepts the trust hereby created upon the terms and conditions herein and in the Original Mortgage provided.

In Witness Whereof, Ohio Electric Power Company, party hereto of the first part has caused its corporate

name and seal to be hereunto affixed and this instrument to be signed by its President or a Vice-President and attested by its Secretary for and in its behalf, and The Seaboard National Bank of the City of New York, party hereto of the second part, has caused its corporate name and seal to be hereunto affixed and this instrument to be signed by its President or a Vice-President and attested by its cashier or an assistant cashier all in the City of New York, as of the day and year first above written.

Ohio Electric Power Company,
By Leo Loeb,
(Seal) Vice-President.

Attest:
D. L. McDaniel,
Assistant Secretary.

In the Presence Of:
F. D. Reid,
C. B. Zeigler.

The Seaboard National Bank of the
City of New York,
By J. A. Burns,
(Seal) Vice-President.

Attest:
C. Clune,
Assistant Cashier.

In the Presence Of:
A. A. Johnson,
R. C. Smith.

State of New York, County of New York, ss.:

On this 29th of May, 1925, before me a Notary Public in and for said County, personally came and appeared Leo Loeb, who being by me duly sworn, did depose and say: That he resides in upper Montclair, New Jersey; that he is the Vice-President of Ohio Electric Power Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order; and that the above-named Vice-President and Assistant Secretary, respectively, of the Ohio Electric Power Company per-

sonally appeared before me and acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said Ohio Electric Power Company, and that it is the free act and deed of each of them personally, and as such officers.

In Testimony Whereof, I have hereunto set my hand and official seal at New York, N. Y., this 29th day of May, 1925.

Mae Coy,
(Seal) Notary Public,
New York County Clerk's No. 383.
New York County Register's No. 7337.
Commission expires March 30, 1927.

State of New York, County of New York, ss.:

On this 29th day of May, 1925, before me a Notary Public in and for said County, personally came and appeared J. A. Burns, who being by me duly sworn, did depose and say: That he resides in the City of New York; that he is the Vice-President of The Seaboard National Bank of the City of New York, the corporation described in and which executed the above instrument; and that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order; and the above-named Vice-President and Assistant Cashier, respectively, of The Seaboard National Bank of the City of New York, personally appeared before me and acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said The Seaboard National Bank of the City of New York, and the free act and deed of each of them personally and as such officers.

In Testimony Whereof, I have hereunto set my hand and official seal at New York, N. Y., this 29th day of May, 1925.

Adolph A. Johnson,
(Seal) Notary Public,
Bronx County No. 21; Register No. 2616A.
Cer. filed in N. Y. Co. No. 132; Reg. No. 6097.
Commission expires March 30th, 1926.

I hereby certify that the above and foregoing is a true and correct copy of the Supplemental Mortgage given by Ohio Electric Power Company to The Seaboard National Bank of the City of New York as Trustee as the same appears on the records of this office, being recorded in Mortgage Record Volume 95, pages 75-78 inclusive.

In Testimony Whereof, I have herounto set my hand and official seal at Norwalk, Huron County, Ohio, this 7th day of November, A. D. 1930.

Will H. Darling,
County Recorder.

(Seal) By Maudie Eaton,
Deputy.

PLAINTIFF'S EXHIBIT No. 30

In the District Court of the United States for the Northern District of Ohio, Western Division.

No. 1040 In Equity.

The Equitable Trust Company of New York,
Plaintiff,

vs.

City of Norwalk, Ohio,
Defendant.

CERTIFICATE

C. E. Bramble, Secretary and Treasurer of the Ohio Electric Power Company, an Ohio corporation, hereby certifies that he is Secretary and Treasurer of said corporation, and by virtue of his office he is in charge of the books containing both the financial records and a record of all corporate action taken by said company; that the directors and stockholders of said company, at respective meetings thereof duly called and held on or about August 28, 1924, conformably to the laws of Ohio, authorized the issue by said company of first mortgage gold bonds in one or more series, maturing at such dates and bearing interest at such rates, respectively, as the Board of Directors of said company should determine and as should be approved by the Trustee thereof; that such bonds were

to be coupon bonds, registerable or non-registerable as to principal, as the Board of Directors of the company might determine, and/or registered bonds without coupons to be executed under the corporate seal of the company, to be signed in its corporate name by its President or Vice-President, impressed with its corporate seal and attested by its Secretary or Assistant Secretary, and authenticated by the certificate of the Trustee thereof, and that the amount of the bonds so to be made, issued, authenticated and delivered was not to be limited, except that no further bonds should be issued at any time if the total amount of bonds outstanding after such issue would in any event exceed the then limit of indebtedness, if any, of the company permitted by law. By the terms of said bonds the Ohio Electric Power Company promised to pay, in the case of coupon bonds, to the bearer thereof, and in the case of registered bonds, to the registered owner thereof, or his assigns, at the office or agency of the company, the principal sum thereof at the maturity thereof with interest as specified therein, in gold coin of the United States of America of the standard weight and fineness as it then existed, on the presentation and surrender thereof, and that the form and tender of said bonds are set forth specifically in the mortgage and deed of trust hereinafter mentioned.

Said C. E. Bramble further certifies that to secure the payment of principal and interest of such bonds of the character above described as might thereafter be issued and outstanding, the Ohio Electric Power Company on or about September 2, 1924, duly executed and delivered to The Seaboard National Bank of the City of New York, as Trustee, the original of a certain mortgage and deed of trust, dated July 1, 1924, and on or about May 29, 1925, said Ohio Electric Power Company executed and delivered to said Seaboard National Bank of the City of New York, as Trustee, a certain supplemental mortgage to said mortgage and deed of trust, dated May 25, 1925; which mortgage and deed of trust and supplemental mortgage thereto are recorded in the Mortgage Records of Huron County, Ohio, in Volume 95, pages 41 to 74, both inclusive, and Volume 95, pages 75 to 78, both inclusive, respectively; that the execution and delivery of said mortgage and deed of trust and the said supplemental mortgage thereto was duly authorized by resolutions of the Board of Directors and of the stockholders of the Ohio Electric Power Company.

C. E. Bramble,
Secretary of the Ohio Electric Power Company.

PLAINTIFF'S EXHIBIT No. 31

In the District Court of the United States for the Northern District of Ohio, Western Division.

No. 1040 in Equity.

The Equitable Trust Company of New York,

Plaintiff,

vs.

City of Norwalk, Ohio,

Defendant.

AFFIDAVIT

State of Ohio, County of Shelby, ss:

C. E. Bramble, being first duly sworn, upon his oath, deposes and says that he is Secretary and Treasurer of the Ohio Electric Power Company, a corporation of the State of Ohio; that following the execution and delivery on or about September 2nd, 1924, by the Ohio Electric Power Company to The Seaboard National Bank of the City of New York of a certain mortgage and deed of trust; dated July 1, 1924, and following the execution and delivery on or about May 29, 1925, by said grantor to said grantee of a certain supplemental mortgage thereto, which mortgage and deed of trust and supplemental mortgage thereto are recorded respectively in Volume 95, pages 41 to 74, both inclusive, and Volume 95, pages 75 to 78, both inclusive, of the Mortgage Records of Huron County, Ohio, the Board of Directors of the Ohio Electric Power Company duly authorized, and said company duly made and executed bonds of the character specified in said mortgage and deed of trust and supplemental mortgage thereto, and submitted said bonds to said The Seaboard National Bank of the City of New York for authentication, all conformably to the provisions of the mortgage and deed of trust and supplemental mortgage thereto; that said bonds were thereupon authenticated by said Trustee and delivered to the Ohio Electric Power Company for issuance and sale; that said bonds were thereafter sold and delivered by the Ohio Electric Power Company for valuable considerations to numerous and various persons and corporations; that said bonds and/or bonds issued in place of a portion thereof, as hereinafter stated, are now outstanding in the hands of holders for value; that the amount of said bonds outstanding at no time has been in excess of the limit provided by law for bonded indebtedness of said the Ohio Electric Power

Company, and that the face amounts, dates of authentication, delivery, issuance and maturities of said bonds, with a statement of those now outstanding, are specifically set forth as follows:

1. Seven Hundred Fifty Thousand Dollars ($750,000.00) principal amount of First Mortgage Gold Bonds 6½% Series A were authenticated and delivered by the trustee on September 2nd, 1924, pursuant to Section 1 of Article III of the mortgage and deed of trust. Which bonds were issued and sold on or about September 2nd, 1924.

2. One Hundred Thousand Dollars ($100,000.00) principal amount of First Mortgage Gold Bonds 6½% Series A were authenticated and delivered by the Trustee on May 28, 1925, pursuant to Article V of the mortgage and deed of trust, upon the basis of property acquired by the Ohio Electric Power Company in May, 1925, including the Norwalk properties. Which bonds were issued and sold on or about May 28, 1925.

3. Ninety-nine Thousand Dollars ($99,000.00) principal amount of First Mortgage Gold Bonds 6½% Series A were authenticated and delivered by the trustee on October 1, 1925, pursuant to said Article V. Which bonds were issued and sold on or about October 1, 1925.

4. Six Hundred Forty-seven Thousand Dollars ($647,000.00) principal amount of First Mortgage Gold Bonds 6% Series B were authenticated and delivered by the trustee on August 30, 1926, pursuant to said Article V. Which bonds were issued and sold on or about August 30, 1926.

5. One Hundred Sixty-nine Thousand Two Hundred Dollars ($169,200.00) principal amount of First Mortgage Gold Bonds 5% Series due 1957 were authenticated and delivered by the trustee on June 20, 1927, pursuant to said Article V. Which bonds were issued and sold on or about June 20, 1927.

6. Prior to July 1, 1927, Sixteen Thousand Seven Hundred Dollars ($16,700.00) principal amount of bonds had been retired by the operation of the Sinking Fund, leaving outstanding a balance of One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) principal amount of Series A and Series B Bonds, in addition to the One Hundred Sixty-nine Thousand Two Hundred Dollars ($169,200.00) principal amount of Series due 1957 Bonds. Prior to June 21, 1927, said One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) principal amount Series A and Series B Bonds were called for redemption

on July 1, 1927, and on June 21, 1927, provision was made for the payment thereof, as provided in Article VI of the mortgage and deed of trust, and One Million Nine Hundred Thirty Thousand Eight Hundred Dollars ($1,930,800.00) principal amount of First Mortgage Gold Bonds 5% Series due 1957, were authenticated and delivered by the Trustee on June 21, 1927; funds for the payment of said One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) principal amount Series A and Series B bonds, called for redemption as aforesaid, were obtained by the sale of a like amount of said series of First Mortgage Gold Bonds due 1957, all of which were issued and sold by the company on June 21, 1927, and said funds received from the sale of One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) principal amount thereof were applied to the redemption of said One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) principal amount of bonds called for redemption, as aforesaid, the remaining Three Hundred Fifty-one Thousand Five Hundred Dollars ($351,500.00) principal amount of said issue was issued and sold and the proceeds thereof applied pursuant to Article V of said Mortgage and Deed of Trust to the redemption of a like amount of underlying bonds as therein defined.

7. Five Hundred Thousand Dollars ($500,000.00) principal amount First Mortgage Gold Bonds 5% Series due 1957 were authenticated and delivered by the Trustee on December 31, 1929, pursuant to Article V of the Mortgage and Deed of Trust, which bonds were issued and sold.

C. E. Bramble.

Sworn to before me and subscribed in my presence this 8th day of November, 1930.

(Seal) Ruby G. Beemer (Lytle).

PLAINTIFF'S EXHIBIT No. 32

In the District Court of the United States for the Northern District of Ohio, Western Division.

No. 1040 In Equity.

The Equitable Trust Company of New York,

Plaintiff,

vs.

City of Norwalk, Ohio,

Defendant.

CERTIFICATE

C. L. Clime hereby certifies that he is an Assistant Trust Officer of The Chase National Bank of the City of New York; that the records of the former The Seaboard National Bank of the City of New York, trustee, and of the former The Equitable Trust Company of New York, successor trustee, with reference to a certain mortgage and deed of trust dated July 1, 1924, and executed and delivered by the Ohio Electric Power Company to said Seaboard National Bank on September 2, 1924, and with reference to the mortgages supplemental thereto are now in the possession and control of The Chase National Bank of the City of New York as successor trustee under said mortgage and deed of trust and said supplemental mortgages; that these records show that bonds of the character described and provided for in said mortgage and deed of trust and said supplemental mortgages were from time to time executed and delivered by the Ohio Electric Power Company to the trustee at the time under said mortgage and deed of trust with a request for the authentication of said bonds by said trustee, all in accordance with the provisions of said instruments, and that said bonds were duly authenticated by said trustee and delivered to said Ohio Electric Power Company for issuance and sale, all as hereinafter more particularly set forth:

1. Seven Hundred Fifty Thousand Dollars ($750,000) principal amount of First Mortgage Gold Bonds 6½% Series A were authenticated and delivered by the trustee on September 2, 1924, pursuant to Section 1 of Article III of the mortgage and deed of trust.

2. One Hundred Thousand Dollars ($100,000.00) principal amount of First Mortgage Gold Bonds 6½% Series A were authenticated and delivered by the trustee

on May 28, 1925, pursuant to Article V of the mortgage and deed of trust, upon the basis of property acquired by the Ohio Electric Power Company in May, 1925, including the Norwalk properties.

3. Ninety nine Thousand Dollars ($99,000.00) principal amount of First Mortgage Gold Bonds 6½% Series A were authenticated and delivered by the trustee on October 1, 1925, pursuant to said Article V.

4. Six Hundred Forty seven Thousand Dollars ($647,000.00) principal amount of First Mortgage Gold Bonds 6% Series B were authenticated and delivered by the trustee on August 30, 1926, pursuant to said Article V.

5. One Hundred Sixty nine Thousand Two Hundred Dollars ($169,200.00) principal amount of First Mortgage Gold Bonds 5% Series due 1957 were authenticated and delivered by the trustee on June 20, 1927, pursuant to said Article V.

6. Prior to July 1, 1927, Sixteen Thousand Seven Hundred Dollars ($16,700.00) principal amount of bonds had been retired by the operation of the Sinking Fund, leaving outstanding a balanceof One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) principal amount of Series A and Series B Bonds, in addition to the One Hundred Sixty-nine Thousand Two Hundred Dollars ($169,200.00) principal amount of Series due 1957 Bonds. Prior to June 21, 1927, said One Million Five Hundred Seventy nine Thousand Three Hundred Dollars ($1,579,300.00) Series A and Series B Bonds were called for redemption on July 1, 1927, and on June 21, 1927, provision was made for the payment thereof as provided in Article VI of the mortgage and deed of trust, and One Million Nine Hundred Thirty Thousand Eight Hundred Dollars ($1,930,800.00) principal amount of First Mortgage Gold Bonds 5% Series due 1957 were authenticated and delivered by the trustee on June 21, 1927, One Million Five Hundred Seventy-nine Thousand Three Hundred Dollars ($1,579,300.00) thereof pursuant to Article VI of the mortgage and deed of trust upon the basis of the redemption of a like amount of Series A and Series B Bonds as aforesaid, and Three Hundred Fifty-one Thousand Five Hundred Dollars ($351,500.00) thereof pursuant to said Article V upon the basis of provision being made for the redemption of a like amount of underlying bonds.

7. Five Hundred Thousand Dollars ($500,000.00) principal amount of First Mortgage Gold Bonds 5% Series due 1957 were authenticated and delivered by the

trustee on December 31, 1929, pursuant to Article V of the mortgage and deed of trust.

C. L. Clune,
Assistant Trust Officer.

Dated November 6, 1930.

PLAINTIFF'S EXHIBIT No. 33

O.K. as to form—E. F. B., H. C. L.

Council Records of the City of Norwalk, Ohio
Dated July 25, 26, and 30, 1890
(Vol. 3 pp. 456)

COUNCIL RECORDS

Norwalk, O., July 25, 1890.

Council of the City of Norwalk, Ohio, met on the following special call of the Mayor:

Mayor's Office, Norwalk, O.,
July 25, 1890

City Councilmen:

You are hereby notified that a special session of the City Council of the City of Norwalk, O. is called to at the Council Chamber on the 25th day of July, 1890, at 7 o'clock P.M. for the consideration of the following business, to-wit:

To pass Ordinance Granting Franchise for Electric Lights, also to pass Ordinance to provide for the Appointment of Inspector of Natural Gas Connections. The above notice was sent to all members of the City Council.

S. E. Crawford, Mayor.

Present—Himberger, Hoddick, Laning, Morgan, Redfield and Suydam. Absent—Meyers, Ryner, Simmons and VanDusen.

President Himberger in the chair.

AN ORDINANCE

To grant certain privileges as therein set forth to the Norwalk Incandescent Light Company of Norwalk, Ohio. Read first time.

AN ORDINANCE

To provide for the appointment of an inspector of Natural Gas Connections, the licensing of gas fitters and the inspection of Natural Gas fittings and connections. Read first time.

This completing the business of the call the Council stood adjourned.

Pres. of the Council.

Attest: John W. Rexford, City Clerk.

(Vol. 3 pp. 457)

Norwalk, O., July 26, 1890.

Council of the City of Norwalk, Ohio, met in special session on call of the Mayor for the passage of the Incandescent Light Ordinance and the ordinance for the appointment of an inspector for Natural Gas Connections.

Present—Himberger, Morgan, Meyers, Redfield, Simmons, Suydam and Clerk Rexford. Absent—Hoddick, Laning, Ryner and VanDusen.

President Himberger in the chair.

The Ordinance granting right of way to the Norwalk Incandescent Light Company read second time.

The Ordinance for the appointment of an inspector for Natural Gas Connections read second time.

On motion Council adjourned.

President of the Council.

Attest: John W. Rexford, City Clerk.

(Vol. 3. pp. 458-459)

Norwalk, O., July 30, 1890.

Council of the City of Norwalk, Ohio, met in special session on call of the Mayor for the purpose of passing the Ordinance granting Right of Way to the Norwalk Incandescent Light Company of Norwalk, Ohio, and for the passage of the Ordinance for the appointment of an Inspector of Natural Gas Connections.

Present—Himberger, Hoddick, Laning, Morgan, Redfield, Simmons, Suydam, Clerk Rexford and City Solicitor Mitchell. Absent—Meyers, Ryner and VanDusen.

President Himberger in the chair.

AN ORDINANCE

The following Ordinance to grant certain privileges as therein set forth to the Incandescent Light Company of Norwalk, Ohio, was read the third time.

AN ORDINANCE

To grant certain privileges as therein set forth to the Incandescent Light Company of Norwalk, Ohio.

For copy of ordinance see Exhibit A attached to second amendment and supplement to the bill of complaint. (Supra, page 35.)

Mr. Redfield moved the passage of the Ordinance, seconded by Morgan. Ayes and nays being called for, the vote stood as follows:

Ayes—Himberger, Hoddick, Laning, Morgan, Redfield, Simmons and Suydam 7. Nays 0.

Ordinance declared passed.

AN ORDINANCE

The following Ordinance for the appointment of an inspector for natural gas connections was read the third time. Mr. Meyers came in at this time.

AN ORDINANCE

To provide for the appointment of an inspector of natural gas connections, the licensing of gas fitters and the inspection of natural gas fittings and connections.

Mr. Laning moved the passage of the Ordinance, seconded by Suydam. Ayes and nays being called for, the vote stood as follows:

Ayes, Himberger, Hoddick, Laning, Morgan, Meyers, Redfield, Simmons and Suydam 8. Nays—0.

Ordinance declared passed.

Council adjourned.

Pres. of the Council.

Attest: John W. Rexford, City Clerk.

PLAINTIFF'S EXHIBIT No. 34

O.K. as to form—E. F. B., H. C. L.

Council Records of the City of Norwalk, Ohio,
Dated October 7, 1890.
(Vol. 3, p. 484)

COUNCIL RECORDS

Norwalk, O., Oct. 7, 1890.

Council of the City of Norwalk, Ohio, met in regular session. Present: Hoddick, Laning, Morgan, Meyers, Redfield, Rynn, Simmons, Suydam, Van Dusen, City Clerk Rexford and City Solicitor Mitchell—absent, Himberger.

President pro tem Rynn in the chair.

Minutes of last meeting read and approved.

Mayor Crawford's certificate read and ordered filed.

Ordinance. Mr. Hoddick offered the following Ordinance and moved the suspension of the rules requiring its reading on three separate days. Seconded by Redfield. On call of the Ayes and Nays the vote stood as follows: Ayes 9, Nays 0. Rules declared suspended.

Mr. Hoddick seconded by Laning moved the passage of the Ordinance. On call of the Ayes and Nays the vote stood as follows. Ayes 9, Nays 0. Ordinance declared passed.

AN ORDINANCE

An Ordinance to Amend an Ordinance Entitled—An Ordinance to Grant Certain Privileges as therein set forth to The Incandescent Lighting Company of Norwalk, Ohio, Passed July 30, 1890.

For copy of ordinance see Exhibit B attached to the second amendment and supplement to the bill of complaint. (See supra, page 36.)

Mr. Redfield moved that Council adjourn. Seconded by Meyers. Motion declared carried.

Pres. Pro Tem of Council.

Attest: John W. Rexford, City Clerk.

PLAINTIFF'S EXHIBIT No. 35

O.K. as to form—E. F. B., H. C. L.

ORDINANCE OF THE CITY OF NORWALK

The following is a copy of an Ordinance as found in a bound volume purporting to be a publication in book form of the General Ordinances of the City of Norwalk, which appears to have been published as a codification of the General Ordinances of the City of Norwalk under an Ordinance passed by the Council of the City of Norwalk, on the 26th day of March, 1895. Said Ordinance appears under the caption "Subdivision 4—Incandescent Light Company," and immediately follows this statement, together with certification as found in said General Ordinance Book:

NATURE AND EXTENT OF GRANT CONDITIONS

"Sec. 62. The Norwalk Incandescent Light Company, of Norwalk, Ohio; its successors and assigns, are hereby granted for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks and alleys and public grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city; provided, that the said company, its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said poles or posts and wires on Main Street in said city shall be at least twenty feet high, and of the usual height otherwise, and be so placed as not to interfere with the travel upon such streets or other places, or with any ornamental or shade trees without the consent of the owners thereof, or of the City Commissioner; and provided further, that on all those parts of such streets or other public places where said poles or wires are erected, the same shall be kept and maintained in good order by said Company, its successors and assigns; and provided further, that said posts and wires shall be so placed as not to interfere with the flow of water in any drain or gutter of said city. The points for the location of such poles or posts shall be determined under the direction of the Street Commissioner or the Council. This grant of way is not exclusive, and the Council reserves the

power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such rights shall not be used so as to interfere with the rights herein granted."

Passed October 7, 1890.

(CERTIFICATION)

"We hereby certify that the above and foregoing ordinance, providing for the revision, codification, arrangement and publishing in book form of the ordinances of the city of Norwalk, Ohio, contains a true and correct revision, codification and arrangement of the ordinances of said city, now in force.

A. C. Greene,
Mayor of the City of Norwalk, Ohio.

Attest: F. W. Christian, City Clerk.
Norwalk, Ohio, March 26, 1895."

PLAINTIFF'S EXHIBIT No. 36

O.K. as to form—E. F. B., H. C. L.

An Ordinance Ordering All Poles in the City of Norwalk, Ohio, to be Painted, and All Unused Poles to be Removed.

Be it ordained by the Council of the City of Norwalk, Ohio, that in compliance with the Codified Ordinances of the said City, the Clerk of said City be and hereby is ordered to notify all companies operating and using poles in this city, that they shall within 60 days from the notice of the said City Clerk, paint all poles standing in the street of said city, and to remove all unused poles; and that upon failure so to do, in the time specified, that the same will be done by the City and the cost and expense of said painting will be charged to the owners of said poles and same collected by legal process.

On motion of Keifer and second of Doane the Ordinance was passed. Yeas 9, Blume, Dillingham, Doane, Gregory, Hill, Kiefer, Lee, Niles and Schwarz. Nays 0.

On motion of Doane and second of Niles, the rules requiring the ordinance to be read on three separate days, was suspended. Yeas 9, Blume, Dillingham, Doane, Gregory, Hill, Kiefer, Lee, Niles and Schwarz. Nays 0. On motion of Doane and second of Hill the ordinance was passed. Yeas 9. Blume, Dillingham, Doane, Gregory, Hill, Kiefer, Lee, Niles and Schwarz. Nays 0.

Ordinance passed May 6, 1901, Vol. 7, page 498, Council Records.

I, F. G. Warner, City Auditor and Clerk of Council of the City of Norwalk, Ohio, do hereby certify that the foregoing is a true and correct copy of the records of the Council of the City of Norwalk, the same being in my possession and under my control.

(Signed) F. G. Warner.

PLAINTIFF'S EXHIBIT No. 37

O.K. as to form—E. F. B., H. C. L.

City Council Chamber,
Norwalk, O., Jan. 4, 1916.

City council met in regular session with President Holiday, Clerk Christian and the following members present: Cole, Fifner, Haas, Heston, Smith, A. C., Spurrier. Absent, Smith, C. R.

ORDINANCE

To authorize the Director of Public Service to contract with Telephone and Electric Companies for the joint use of poles.

Be it ordained by the Council of the City of Norwalk, State of Ohio, as follows, to-wit:

Section 1. That the Director of Public Service be and he hereby is authorized to enter into such contract or contracts as he may deem proper with telephone companies or electric companies operating within the City of Norwalk, for the joint use by the City of poles owned and used by such company or companies of poles owned and used by the city for the distribution of electric current, for the purpose of reducing the duplication of poles on the streets of said city, where, in the opinion of the Director of Public Service such joint use can be made without detriment or danger to the distribution of electric current on said city's distribution system.

Section 2. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

It was moved by Fifner, seconded by Smith, A. C., that the rules requiring the ordinance to be read on three separate days be suspended. Ayes, Cole, Fifner, Haas, Heston, Smith, A. C., Spurrier.

On motion of Smith, A. C., seconded by Haas, the ordinance was passed. Ayes, Cole, Fifner, Haas, Heston, Smith, A. C., Spurrier.

On motion of Cole, seconded by Spurrier, council adjourned to Tuesday, January 11, at 7:30 o'clock. Ayes, 6.

A. C. Holiday, President,
R. L. Christian, Clerk.

I, F. G. Warner, City Auditor and Clerk of Council of the City of Norwalk, Ohio, do hereby certify that the foregoing is a true and correct copy of the records of the council of the City of Norwalk, the same being in my possession and under my control.

(Signed) F. G. Warner.

PLAINTIFF'S EXHIBIT No. 38

O.K. as to form—E. F. B., H. C. L.

Passed July 1, 1924.

CONSTRUCTION AND MAINTENANCE OF ELECTRIC LIGHT AND POWER WIRES

AN ORDINANCE

Be it ordained by the Council of the City of Norwalk, Ohio, three-fourths of all members elected thereto concurring, as follows:

Section 1. That all electric light and power wires, telephone, signal and trolley wires in operation in the corporate limits of the City of Norwalk, Ohio, shall be constructed and maintained in accordance with the following specifications, in regard to clearances, spacing, heights and positions. Duplicate poles lines shall be avoided where possible and safety of the public and workmen must be given first consideration in constructing all lines.

Section 2. Poles. Poles shall be of a height sufficient to allow spacing of conductors as below, when used as joint poles. And when used by one utility only, they shall be only high enough to allow the proper vertical spacing of the utilities wires, and give the clearance from the bottom wire to ground of not less than 16 feet at the lowest point of sag. They shall be set not less than five feet in the ground nor nearer than 10 feet to a plug. They shall be spaced at a distance apart of not less than 140 feet and not nearer the curb than 6 inches inside the curb to the face of the pole, where pipe lines or other conditions conflict with this spacing, permit must be received from the Service Director before setting closer to curb, and consideration must be given driveways and property lines.

They must be painted and set in line parallel with the street and must be set straight with the exception of poles supporting trolley wires which may be raked away from the trolley, not to exceed 12 inches.

If stepped, they may be stepped with wood blocks to a height of 8 feet; blocks to be set in the lead, and metal stops to be set at right angles to the lead, the lowest step to be on the field side of the pole.

Section 3. Guy Wires and Guys. Guys shall be installed where a line terminates or changes direction. Guy wire to be not smaller than #9 galvanized iron and to

be fastened to an anchor placed in line with the pull of the pole line at a distance from the pole of not less than ¼ of the distance it is attached up the pole, and shall be insulated from the pole at a distance of not less than 6 feet, by an insulator similar to #504, and a similar insulator placed at least 8 feet from the ground, and a shield to be placed on all guys to extend at least 8 feet from the ground. Line guys when anchored to a pole 8 feet or above the ground need not be shielded but must have same insulator as a ground guy.

Section 4. Relative Levels of Wire Cables and Suspension Lines. Conductors shall be arranged in the order of their operation voltage, the highest voltage conductors to occupy the highest position on the poles and the supporting structure or cross arm to be set not less than 9 inches from the top of the pole to the center. The secondary or supply lines, to be not less than 24 inches center to center next below the top support. The signal lines or suspension wires to be not less than 36 inches next below the secondary wires, they may, however, give this position to the trolley span wire or feeders, or private signal wires, maintaining at all times not less than 16 feet between the lowest point of sag and the ground, and spacing at least 24 inches clearance between such trolley span wires, feeders private signal lines and the signal lines or cables.

Vertical spacing of cross arms or secondary racks of supply lines shall be not less than 24 inches from center to center. Service wires of electric or signal utilities may be placed where convenient so that they will at all times maintain a distance above the ground which will be equal to the height of the service or not less than 12 feet above the ground and to clear other wires or cables of different utility by at least 12 inches on voltage of 0 to 300 and 30 inches on voltages of 300 to 7500.

Section 5. Cross Arms Supporting and Wires Sizes. All cross arms to be attached to the pole in a gain not less than ½ inch deep, with a ⅝ inch through bolt, braced with two braces set down the pole the same distance they are out from the center of the pole, to be on the outside of the cross arm bent to meet the pole parallel to the pole. Wire for electric light and power to be not less than #8 for voltage up to 750 volts and to be not smaller than #6 for all voltages of over 750 volts, all wire to be triple braid cotton weather proof. Bare wire to be prohibited for use on any electric light or supply lines.

Section 6. Transformers and Cable Boxes. Transformers to be hung from a cross arm supporting the pri-

mary wires feeding the transformer and to be not less than 24 inches below the secondary to which it is connected, the bottom of the transformer to be not less than 60 inches clearance above signal wires, cables or suspension wires. Transformers of over 25 Kilowatt capacity are to be supported on a platform suitably braced and same clearance above, except clearance between the platform and signal wires and cables may be not less than 12 inches.

Cable boxes and transformers are not to be placed on the same pole and cable boxes must clear secondary supply lines by 12 inches and other lines in same spacing as signal wires and cables.

Section 7. Horizontal Clearance or Spacing of Wires. The minimum separation in a horizontal direction at points of support of supply conductors carrying a difference of potential of 0 to 500 volts shall be not less than 6 inches. A difference of potential of 500 volts to 7500 volts of not less than 12 inches. Where conductors of one line are carried near the supporting structure of another line and within 30 inches of the supporting structure of the other line, they must be attached to the supporting structure, maintaining their relative position on the structure. Climbing space shall be maintained on all poles of not less than 30 inches on one side of the pole.

Where more than one cable or secondary or suspension wire is attached to the same pole, they should be as far as possible, all on the same side of the pole. Horizontal position on cross arms shall be arranged with the street light wires taking the outermost pins, the primary next and if secondary is placed on the same cross arm, they should take the pole pins.

Section 8. Under ground supply lines or risers shall be in insulating or metal conduit to a point at least 12 feet above the ground and if signal wires, trolley feed wires, suspension or cable are attached to he same pole the conduit shall extend above the feeders, signal wires or cables. Transformers connected three wire shall have neutral wire grounded by being permanently and mechanically connected and soldered to a ground of not less than #— weatherproof copper wire run down the pole and connected to the ground plate, pile or coil, in the ground a sufficient depth to make good damp contact at all times and covered by wooden strips nailed to the pole.

Trees shall be kept trimmed at all times so that neither the movement of the trees nor increased sagging

of the wires shall make contact. A permit for trimming trees shall be received from the Service Director in writing and trees trimmed neatly and all precaution taken to safeguard the health of the tree. This applies to all electric supply lines having a potential to ground of 500 volts or over, and the cost of trimming shall be prorated to the utilities having lines or poles on conflict with the tree. On discontinuance of any service the wires acting as supply or service lines shall be removed from the supporting structure or building to which they were attached within 30 days after such discontinuance and all poles are to be removed from the streets, alleys or private properties when vacant.

Section 9. All new construction shall be built in accordance with the above rules, and all wires, cables, suspension wires, etc., now in operation shall be made to meet these requirements when so ordered by the Director of Public Service, within 30 days after the date of the order.

Antenna of aerial for wireless shall not be connected to any pole or supported from any pole which is also supporting electric light wire of any voltage.

Any extensions or constructions of electric light or power lines for supply or secondary lines shall be approved by the Director of Public Service, before electricity can be turned on and a permit shall have been applied for and received before work on same is started.

Section 10. Penalty. Any extensions or constructions or existing conduit conditions not executed in conformity with the above shall be condemned and if not disconnected and removed within 30 days from the date of such condemnation, shall be disconnected and removed by the City under the direction of the Director of Public Service and the material sold to cover cost of such work.

Section 11. That all ordinances and parts of ordinances or any part thereof heretofore passed by the Council of the City of Norwalk, Ohio, not in conformity with the foregoing sections are hereby repealed.

Section 12. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

L. A. Heston, President of Council.

Attest F. G. Warner, Clerk.

Approved A. C. Smith, Mayor.

PLAINTIFF'S EXHIBIT No. 39.

O.K. as to form—H. C. L., E. F. B.

(Copy)

City Council Chamber,
Norwalk, Ohio, Sept. 1, 1925.

A Resolution was read to authorize the City Solicitor to secure as assistant Council, G. Ray Craig to assist him in the probable litigation between the City of Norwalk and the Ohio Electric Company. The Clerk of Council was asked to read the Ordinance to Regulate the Construction and Maintenance of Electric Light and Power Wires, Telephone, Signal and Trolley Wires.

It was stated by Mr. Leighton, when asked if the Ohio Electric Company was violating the provisions of the Ordinance, that they had and were still violating same.

It was moved by Schock, seconded by Wilson, that the Resolution be passed. Roll call, Yeas, Schwartz, Ernsthausen, Wilson, Schock, Stoll and Fifner. Nay, Ruffing. Yeas, six. Nays, one. The resolution was declared passed.

I, F. G. Warner, City Auditor and Clerk of Council of the City of Norwalk, Ohio, do hereby certify that the foregoing is a true and correct copy of the records of the council of the City of Norwalk, the same being in my possession and under my control.

(Signed) F. G. Warner.

PLAINTIFF'S EXHIBIT No. 40

O.K. as to form—H. C. L., E. F. B.

RESOLUTION

To secure assistant council in the probable litigation between the City of Norwalk and the Ohio Electric Power Company.

Be it resolved by the Council of the City of Norwalk, Ohio, two-thirds of all members elected thereto concurring as follows:

Section 1. That the City Solicitor is hereby authorized and empowered to retain the services of G. Ray Craig to assist him in the probable litigation between the City of Norwalk, Ohio, and The Ohio Electric Company.

Section 2. That this resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed September 1, 1925.

L. A. Heston,
President of Council.

Attest: F. G. Warner, Clerk.
Approved: A. C. Smith, Mayor.

I, F. G. Warner, Auditor of the City of Norwalk, Ohio, and clerk of council, hereby certify that the resolution hereto attached is a true copy as passed September 1, 1925, per council record Vol. 8, page 424.

(Signed) F. G. Warner,
City Auditor and Clerk of Council.

PLAINTIFF'S EXHIBIT No. 41

O.K. as to form—E. F. B., H. C. L.

Council Records of the City of Norwalk, Ohio;
Dated March 23, 1926.
(Vol. 8, p. 445, et seq.)

COUNCIL RECORDS

"City Council Chamber,
Norwalk, Ohio, March 23, 1926.

City Council met this day in adjourned session from March 16, with L. A. Heston, President of Council, and members Schwartz, Ernsthausen, Wilson, Burdue, Call and Fifner.

Minutes of session of March 2 and March 16 were approved as read.

* * *

A resolution was read the first time requiring The Ohio Electric Power Company within thirty (30) days, to remove and take from all the public streets, alleys, and other public places, in said City of Norwalk, Ohio, such of its poles, wires, lines, guys, braces, cross arms and all other equipment, now located in said public streets, etc.

It was moved by Call, seconded by Fifner, that the rules be suspended requiring reading of the Ordinance on three separate days. Roll call, yes, Schwartz, Ernsthausen, Wilson, Burdue, Call and Fifner. Yeas, six. Nays, none. Absent, Stoll. The Rules were declared suspended.

It was moved by Wilson, seconded by Call, that the Resolution be passed. Roll call, yes, Schwartz, Ernsthausen, Wilson, Burdue, Call and Fifner. Yeas, six. Nays, none. Absent, Stoll. The Resolution was declared passed.

* * *

On motion of Ernsthausen, seconded by Fifner, Council adjourned.

(Signed) L. A. Heston, Pres. of Council.
(Signed) F. G. Warner, Clerk."

PLAINTIFF'S EXHIBIT No. 42

O.K. as to form—E. F. B., H. C. L.

Resolution of Norwalk City Council Requesting Ohio Electric Power Co. to Remove Its Equipment From the Streets of Norwalk, Ohio, Passed March 23, 1926.

RESOLUTION

Whereas, the City of Norwalk, Ohio, is the owner of a municipal lighting system, consisting of a plant for the generation of electricity for lighting and power purposes and of certain transmission lines located in the public streets, alleys and public grounds of said City; and

Whereas, Ohio Electric Power Company is, also, maintaining and operating in various public streets, alleys and public places in said City electric transmission lines, consisting of poles, wires and other equipment; and

Whereas, said Ohio Electric Power Company is maintaining and operating its said transmission lines without any franchise, license or authority from said City of Norwalk, and in the maintenance and operation of its said lines, said Ohio Electric Power Company has and is interfering with said municipal lighting system; and

Whereas, the said transmission lines of said Ohio Electric Power Company are obstructions and encumbrances in the streets, alleys and other public places of said City, and are a source of danger and a menace to the safety of the persons using said streets, alleys and other public places:

Now, Therefore, Be It Resolved by the Council of the City of Norwalk, State of Ohio, that said Ohio Electric Power Company be notified, by the service of a copy of this Resolution duly certified by the Clerk of said Council, upon the managing officer, or agent or agents of said Ohio Electric Power Company, in said City of Norwalk, Ohio, that said Ohio Electric Power Company be, and is hereby, required, within thirty (30) days from the service of said certified copy of this Resolution upon its said managing officer or agent or agents, to remove and take from all the public streets, alleys and other public places in said City of Norwalk, Ohio, such of its poles, wires, lines, guys, braces, cross-arms and all other equipment, now located in said public streets, alleys and other public places, and that said Ohio Electric Power Company be required to take from, and out of, said streets,

alleys and other public places all of its physical property now located therein.

Be It Further Resolved by said Council of said City of Norwalk, State of Ohio, that F. G. Warner, Auditor of said City, and ex-officio Clerk of said Council, be, and he hereby is, authorized, within three (3) days after the passage of this Resolution and its legal advertisement, to serve upon the managing officer or managing agent or agents of said Ohio Electric Power Company, in said City of Norwalk, Ohio, a certified copy of this Resolution and of the fact that the same was passed by said Council at a meeting held by it, at the City of Norwalk, Ohio, on the twenty-third day of March, 1926, and that said F. G. Warner, as said Auditor and ex-officio Clerk of said Council, be required to make return to said Council of his proceedings in making said service.

Passed March 23, 1926.

L. A. Heston, Pres. of Council.

Attest: F. G. Warner, Clerk
Approved: A. C. Smith, Mayor.

PLAINTIFF'S EXHIBIT No. 43

O.K. as to form—E. F. B., H. C. L.

Council Records of the City of Norwalk, Ohio,
Dated April 6, 1926.
(Vol. 8, p. 447.)

COUNCIL RECORDS

"City Council Chamber,
Norwalk, Ohio, April 6, 1926.

City Council met this day in regular session with President of Council, L. A. Heston, and members Schwartz, Ernsthausen, Wilson, Burdue, Call and Fifner. Absent, Stoll.

Minutes of last meeting read and approved.

* * *

The City Auditor, as directed at the previous Council meeting, read his 'Return of Service of Resolution and Certificate thereto on the Ohio Electric Power Company, copy of which is as follows:

'To the Council of the City of Norwalk, Ohio:

Return of service of resolution and certificate thereto on Ohio Electric Power Company.

The State of Ohio, Huron County, ss.

I, F. G. Warner, Auditor of the City of Norwalk, Ohio, and ex-officio Clerk of the Council of said City, do hereby certify and represent that on the third day of April, in the year 1926, I, as said Auditor and Clerk, did serve upon D. E. Turkle, as Managing Agent of Ohio Electric Power Company, at the office of said Ohio Electric Power Company, at the City of Norwalk, Ohio, by handing to him personally, a duly certified copy of the Resolution passed by the Council of said City of Norwalk, Ohio, on the 23rd day of March, 1926, and of the fact that the same was passed by said Council at a meeting held by it in the City of Norwalk, Ohio, on said 23rd day of March, 1926, a true copy of which said Resolution is hereto attached, together with a true copy of the Certificate thereto.

And I do further certify that true copies of all attached documents, which I, as said Auditor and Clerk so handed to said D. E. Turkle, as said Managing Agent, are hereto attached constituting a part of this return.

In Witness Whereof, I have hereto set my hand and the seal of the City of Norwalk, Ohio, on this sixth day of April, in the year 1926.

(Signed) F. G. Warner,
Auditor of the City of Norwalk, Ohio, and
Clerk exofficio of the Council of said City.

It was reported that a Junk Yard had been started at the corner of League and Milan Avenue, in conflict with the City Ordinance. The same was referred to the Mayor for action.

An Ordinance to Regulate the Parking of Motor Vehicles after discussion was placed on its first reading.

On motion of Schwartz, seconded by Fifner, Council adjourned.

(Signed) L. A. Heston, Pres. of Council
(Signed) F. G. Warner, Clerk.''

PLAINTIFF'S EXHIBIT No. 44

Council Records of the City of Norwalk, Ohio,
Dated May 18, 1926.
(Vol. 8, p. 451.)

COUNCIL RECORDS:

"City Council Chamber,
Norwalk, Ohio, May 18, 1926.

City Council met this dav in regular session with L. A. Heston, President of Council and members Schwartz, Ernsthausen, Wilson, Call and Fifner. Absent, Soll and Burdue.

Minutes of last meeting read and approved.

The Committee on the Gray Street proposed improvement were not ready to report and were given further time.

A Resolution was read, asking the Prosecuting Attorney of Huron County, E. G. Martin, to commence quo warranto ouster proceedings against the Ohio Electric Power Company.

It was moved by Fifner, seconded by Call that the Resolution be passed. Roll call, yes, Schwartz, Ernsthausen, Wilson, Call and Fifner. Yeas, five. Nays, none. Absent Burdue and Stoll. The resolution was declared passed.

* * *

On motion of Schwartz, seconded by Fifner, Council adjourned.

(Signed) L. A. Heston, Pres. of Council.
(Signed) F. G. Warner, Clerk."

PLAINTIFF'S EXHIBIT No. 45

O.K. as to form—E. F. B., H. C. L.

Resolution of the City Council of Norwalk Requesting Quo Warranto Proceedings for Ouster of Ohio Electric Power Co., Passed May 18, 1926.

A RESOLUTION

Whereas, The Ohio Electric Power Company, a corporation, has taken charge and possession of, as of right, and is now using the public streets, lanes, alleys, avenues and public places of the City of Norwalk, State of Ohio, for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said City with electricity for commercial and private lighting purposes and is charging and receiving pay for said electricity so furnished, without the consent or authority of the State of Ohio, or of said City of Norwalk:

Now, Therefore, Be it Resolved by the Council of the City of Norwalk, State of Ohio, that complaint of said use by said The Ohio Electric Power Company be and hereby is made to Edgar G. Martin, as Prosecuting Attorney of Huron County, Ohio, and that said Edgar G. Martin, in his capacity as said Prosecuting Attorney, be, and he hereby is, requested, authorized and directed to take such legal steps as are provided under the laws of the State of Ohio in quo warranto to oust said The Ohio Electric Power Company from the use and enjoyment of said liberties, franchises and privileges.

And be it further resolved that said Edgar G. Martin, as said Prosecuting Attorney, Charles Suhr, as City Solicitor of said City, and G. Ray Craig, be engaged to do all things necessary in quo warranto proceedings for the ouster of said The Ohio Electric Power Company; and be it further resolved that the Clerk of said Council be, and he hereby is, authorized and directed to transmit to said Edgar G. Martin, as said Prosecuting Attorney, a duly certified copy of this resolution and its passage.

Passed May 18, 1926.

L. A. Heston, Pres. of Council.

Attest: F. G. Warner, Clerk.

Approved: A. C. Smith, Mayor.

PLAINTIFF'S EXHIBIT No. 46

O.K. as to form—E. F. B., H. C. L.

A RESOLUTION

To Employ Legal Counsel to Assist City Solicitor in Prosecuting Litigation in Federal Court.

Whereas, a suit entitled The Equitable Trust Company of New York vs. The City of Norwalk, Ohio, has been filed in the Distrct Court of the United States, Northern District of Ohio, Western Division, at Toledo, Ohio, in which suit the City of Norwalk is sought to be enjoined from enforcing the judgments and decrees of the Ohio Court of Appeals and the Ohio Supreme Court heretofore obtained in quo warranto proceedings against The Ohio Electric Power Company:

Now, Therefore, be it resolved by the Council of the City of Norwalk, State of Ohio, that G. Ray Craig, Norwalk, Ohio, and Edgar G. Martin, Norwalk, Ohio, be and hereby are employed as legal council to assist the City Solicitor in defending said suit, with full power to act in all matters pertaining to said case and incident thereto and also including such further actions as may be required in carrying out the orders and decrees of the State Courts in the quo warranto case against the Ohio Electric Power Company:

And, be it further resolved that the Clerk of said Council be, and hereby is, authorized and directed to transmit to said Edgar G. Martin, and G. Ray Craig duly certified copies of this resolution and its passage.

Passed January 13, 1930.

R. E. Fader,
President of Council.

Approved, Cort M. Schock, Mayor.

Attest: F. G. Warner, Clerk of Council.

I, F. G. Warner, City Auditor and Clerk of Council of the City of Norwalk, Ohio, do hereby certify that the foregoing is a true and correct copy of the records of the Council of the City of Norwalk, the same being in my possession and under my control.

(Signed) F. G. Warner.

PLAINTIFF'S EXHIBIT No. 47

O.K. as to form—E. F. B., H. C. L.

IN THE COURT OF COMMON PLEAS, HURON COUNTY, OHIO

No. 12781

Ohio Electric Power Company

Plaintiff

vs.

Northern Ohio Telephone Company, the City of Norwalk, Ohio, Fred Higgins, A. C. Smith and Bert Webster

Defendants

ACTION FOR INJUNCTION

Pleas before the Honorable Irving Carpenter, one of the Judges of the Court of Common Pleas within and for the County of Huron and State of Ohio; at a term of said Court begun and held at the Court House in Norwalk in said County and State on the 2nd day of September, A. D. 1930. Be it remembered that heretofore, to-wit: on the 26th day of October, A. D. 1927, plaintiff filed in the office of the Clerk of said Court, their petition for Injunction, which said petition is in the words and figures following, to-wit:

IN THE COURT OF COMMON PLEAS, HURON COUNTY, OHIO

12781

Ohio Electric Power Company

Plaintiff

vs.

Northern Ohio Telephone Company, The City of Norwalk, Ohio, Fred Higgins, A. C. Smith and Bert Webster

Defendants

PETITION

Plaintiff for its Petition herein says that it is a corporation duly organized and existing under the laws of The State of Ohio.

That the defendant, the Northern Ohio Telephone Company, is a corporation duly organized and existing under the laws of the State of Ohio.

Plaintiff further says that it is a public service corporation and distributing electric light and power to the citizens and industrial plants of the City of Norwalk, Ohio; that in the conduct of said business it has pole lines and overhead construction by way of wires and conduits on practically all the streets of the City of Norwalk, and especially on West Main Street and North and South Linwood Avenues in said City; that said plaintiff is the owner of said pole lines and the overhead construction consisting of wires and conduits attached to said poles.

Plaintiff further says that it has a legal right to operate upon the streets, public places and ways of the City of Norwalk, Ohio, and especially upon said West Main Street and North and South Linwood Avenues.

Plaintiff further says that said defendants without any right or authority so to do, are threatening to destroy and remove said poles and wires and overhead construction, as aforesaid, and is wrongfully removing and destroying the same upon West Main Street in said city.

Plaintiff further says that unless restrained, that said defendants will commit further destruction of Plaintiff's property, and that the destruction of said property and the removal of said poles and power lines will do great and irreparable injury to Plaintiff, for which it has no adequate remedy at law.

Plaintiff further says that the Judge of the Court of Common Pleas, of Huron County, Ohio, is absent from said Huron County.

Wherefore, plaintiff prays for a temporary injunction restraining said defendants and the employees of said defendants, The Northern Ohio Telephone Company and the City of Norwalk, Ohio, from removing, interfering with and destroying said poles and overhead construction light and power lines of said plaintiff in and upon and along the streets, public places and ways in the City of Norwalk, Ohio, and especially upon and along West Main Street and North and South Linwood Avenues in said City; that upon final hearing said injunction may be perpetual, and for such other relief as justice and equity require.

W. R. Pruner,
Attorney for Plaintiff,
Ohio Electric Power Company.

State of Ohio, Huron County, ss.

W. R. Pruner being first duly sworn, says that said plaintiff is a corporation; that he is the attorney for said plaintiff, duly authorized in the premises, and that the facts stated in the foregoing Petition are true.

W. R. Pruner.

Signed in my presence and sworn to before me this 26th day of October, 1927.

John R. Berry
Clerk of Courts

(Seal)

Norwalk, O. October 26/27. Temporary injunction allowed as prayed for in the foregoing petition. Bond in the sum of $1000.00 ordered. J. M. Bechtol Probate Judge.

Thereupon on the 26th day of October, A. D. 1927 the following Precipe was filed in the office of the Clerk of said Court, to-wit:

PRECIPE:

To the Clerk of said Court: Issue order of injunction and summons to all the defendants in the above case to the Sheriff of Huron Co. and make the same returnable according to law.

W. R. Pruner
Attorney for Plaintiff.

Thereupon on the 26th day of October, A. D. 1927 the following Summons was issued to the Sheriff of Huron County; to-wit:

SUMMONS:

The State of Ohio, Huron County. Common Pleas Court.

To the Sheriff of said County: You are hereby commanded to notify Northern Ohio Telephone Company, The City of Norwalk, Ohio, Fred Higgins, A. C. Smith and Bert Webster that they have been sued by Ohio Electric Power Company in the Court of Common Pleas of said Huron County, and must answer by the 26th day of November, A. D. 1927, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly. Said Sheriff will make due return of this summons on the 7th day of November, 1927. Witness my

hand and the seal of said Court, this 26th day of October, 1929.

John R. Berry, Clerk
(Seal) By Florence B. Stratton, Deputy.

Endorsements: Summons returnable Nov. 7th, 1927. In action for Injunction. Temporary order of injunction allowed as prayed for in the petition. Bond required in the sum of $1000.00.

J. M. Bechtol
Attest: Probate Judge
John R. Berry
By Florence Stratton, Deputy

Thereupon on the 27th day of October, A. D. 1927 the foregoing Summons was returned by said Sheriff endorsed as follows, to-wit:

Sheriff's Return: The State of Ohio, Huron County. Received this writ October 26, 1927, at 10:30 o'clock A.M. And on October 26, 1927, I served the within named Fred Higgins, A. C. Smith and Bert Webster by personally handing to each of them a true and certified copy thereof with all the endorsements thereon. And on the 26th day of October, 1927, I served the within named The City of Norwalk, Ohio, by handing a true and certified copy thereof with all the endorsements thereon to A. C. Smith, Mayor of said City of Norwalk, Ohio. And on the 26th day of October, 1927, I served the within named Northern Ohio Telephone Company by handing a true and certified copy of this writ with all the endorsements thereon to H. C. Johnson, local manager for said Northern Ohio Telephone Company, there being no president, secretary or other chief officer of said Northern Ohio Telephone Company found within my County.

C. D. Trimner, Sheriff.
By Dolcie Bogart, Deputy.

Thereupon on the 26th day of October, 1927 the following Order of Injunction was issued to the Sheriff of Huron County, to-wit:

Order of Injunction: The State of Ohio, Huron County, ss. Court of Common Pleas, Huron County, Ohio. No. 12781. Ohio Electric Power Company, Plaintiff vs. Northern Ohio Telephone Company, The City of Norwalk, Ohio, Fred Higgins, A. C. Smith and Bert Webster, Defendants. To said Defendants, Northern Ohio Telephone Company, The City of Norwalk, Ohio, Fred Higgins, A. C. Smith and Bert Webster. You are

hereby enjoined from removing, interfering with and destroying poles and overhead construction light and power lines of plaintiff in and upon and along the streets, public places and ways in the City of Norwalk, Ohio, and especially upon and along West Main Street and North and South Linwood Avenues in said City until the further order of the Court. Witness my signature and the seal of said Court at Norwalk, Ohio, this 26th day of October, 1927.

(Seal) John R. Berry, Clerk.

Thereupon on the 27th day of October, A. D. 1927 the foregoing Order of Injunction was returned by said Sheriff endorsed as follows, to-wit:

Sheriff's Return: The State of Ohio, Huron County, ss. Received this writ October 26th, 1927, at 10:30 o'clock A.M., and pursuant to its command, I served the within named Northern Ohio Telephone Company, on the 26th day of October, 1927, at the hour of 12:45 o'clock P.M., by handing a true and certified copy of this writ with all the endorsements thereon to H. C. Johnson, local manager for said Northern Ohio Telephone Company there being no president or other chief officer of said Northern Ohio Telephone Company found within my county. And on the 26th day of October, 1927, at the hour of 12:30 o'clock P.M., I served the within named City of Norwalk, Ohio, by handing a true and certified copy of this writ with all the endorsements thereon to A. C. Smith, Mayor of said City of Norwalk, Ohio. And on the 26th day of October, 1927, at the hour 12:30 o'clock P.M., I served this writ by handing to the within named A. C. Smith personally a true and certified copy thereof with all the endorsements thereon. And on the 26th day of October, 1927, at the hour of 12:30 o'clock P.M., I served this writ by handing to the within named Bert Webster personally a true and certified copy thereof with all the endorsements thereon. And on the 26th day of October, 1927, at the hour of 12:50 o'clock P. M., I served this writ by handing to the within named Fred Higgins personally a true and certified copy thereof with all the endorsements thereon.

C. D. Trimner, Sheriff
By Dolcie Bogart, Deputy.

Thereupon at the September 1927 Term of Court, to-wit: October 26th, 1927.

Journal Entry: This cause came on to be heard before me, the undersigned, on the application of the plain-

tiff for a temporary injunction; whereupon for cause shown to my satisfaction, the following order was made by me: Oct. 26, 1927. Temporary Injunction allowed as prayed for in the foregoing petition. Bond in the sum of $1000.00, ordered.

J. M. Bechtol,
Probate Judge.

Thereupon at the January 1928 Term of Court, to-wit: March 24th, 1928.

Journal Entry: Upon application, leave is granted to Defendants, The City of Norwalk, Fred Higgins, A. C. Smith and Bert Webster, to file answers herein by April 7th, 1928.

Thereupon on the 7th day of April, A. D. 1928 the following joint answer of the City of Norwalk, Ohio, A. C. Smith and Bert Webster was filed in the office of the Clerk of said Court, to-wit:

Joint Answer: In the Common Pleas Court of Huron County, Ohio. Case No. 12781. Ohio Electric Power Company, Plaintiff, vs. Northern Ohio Telephone Company, the City of Norwalk, Ohio, Fred Higgins, A. C. Smith and Bert Webster. Now come the defendants, the City of Norwalk, Ohio, a municipal corporation organized under the laws of the State of Ohio, A. C. Smith and Bert Webster, and for their answer to the petition of the plaintiff say:

That they admit that plaintiff is a corporation organized under the laws of the State of Ohio; admit that the defendant, Northern Ohio Telephone Company, is a corporation organized under the laws of the State of Ohio; admit that plaintiff is a distributor of electricity for light and power purposes in said City of Norwalk; admit that it has and uses certain pole lines and overhead construction in the streets of said City of Norwalk and on West Main Street and North and South Linwood Avenues in said City; admit that plaintiff is the owner of some of said pole lines and certain overhead construction consisting of wires; and admit that at the time of the commencement of this action the Judge of this Court was temporarily absent from said Huron County.

Further answering said petition, these answering defendants deny each and every allegation, averment and statement in the petition contained.

Charles Suhr
City Solicitor.

Verification: The State of Ohio, Huron County, ss. F. G. Warner, being first duly sworn, says that he is the duly elected and qualified Auditor of the City of Norwalk, one of the defendants in the above entitled action; and that the facts stated in the foregoing answer are true, as he believes.

F. G. Warner.

Sworn to before me, and subscribed in my presence, on this 7th day of April, 1928.

Charles Suhr,
Notary Public, Huron County, Ohio

PLAINTIFF'S EXHIBIT No. 51

CITY OF NORWALK, OHIO
Department of Electricity and Water

May 14, 1925.

The Ohio Electric Power Co., Norwalk, Ohio.
Gentlemen:

There is an ordinance in existence on the ordinance book of the City of Norwalk covering the extension of Electric Light or power lines within the city, which prohibits the construction of any new lines or the extension of any existing lines without a permit being given by the Director of Public Safety. This ordinance also carries a penalty for the violation of this ordinance which is, That the lines in question shall be disconnected and removed from the public property within thirty days from a notice given by the Director to the offending party.

I am authorized by the Director of Public Safety and Service to notify you by this letter that you are to remove the wires which you have extended from Olive Street on Benedict Ave to the property marked as #196 Benedict Ave within the specified time of thirty days from date.

Also you are hereby notified to remove the wires which you have constructed on East Main St. from the transformer on the north side of East Main St in front of #170 across the street and one span East to the New house not numbered, within the period of thirty days from date, this ordinance authorizes the city to remove all wiring etc after that date.

Very truly yours
City of Norwalk
Mc G. Irvin, Sup't.

PLAINTIFF'S EXHIBIT No. 52

CITY OF NORWALK, OHIO
Department of Public Service

June 18, 1925.

The Ohio Electric Power Co., Norwalk, Ohio.

Dear Sirs:

You will take notice that your Company have or caused to be erected a service line from a point on East Main Street between Wooster Street and Milan Avenue, extending north on Wooster and Monroe, diagonally, thence diagonally from Monroe to the junction of Milan Avenue and Marshall Street in City of Norwalk, Ohio.

This line is a duplicate of and parallels a service line that had been previously erected which is now and has been in use prior to the erection of your line.

This line is clearly in violation of Section 9 of the Wire Ordinance of the City of Norwalk, Ohio.

You are hereby requested to remove said line within thirty days from the date of this notice or the same will be removed by the city as provided by Section 10 of said Wire Ordinance.

Yours truly,
W. P. Leighton,
Director of Public Service & Safety.

WPL:J

PLAINTIFF'S EXHIBIT No. 53

CITY OF NORWALK, OHIO
Department of Electricity and Water

June 29, 1925.

The Ohio Electric Power Co., Norwalk, Ohio.

Gentlemen:

The Director of Public Service and Safety has instructed me to issue the following orders:

The removal within thirty days of the wires constructed on Benedict Ave. from Olive Street south to the residence known as #196. Also the wires on East Main Street extending from the transformer on the North side of the street in front of #170 crossing the street and extending one span east to the property known as #176 East Main street.

You have a three phase 2200 volt line on North West Street from West Main St. north to Jefferson St. and thence on Jefferson St. to Wheeling Ave. As you have no three phase customers on this line, it therefore is a vacant three phase line and comes under the provisions on Section #8 the last paragraph, and Sections #9 and 10 of the Ordinance passed July 1st, 1924.

Also the same condition exists on Benedict Ave. from the point at Norwood Ave. south to Olive Street; you are hereby ordered to remove from the street the Three Phase line known as a primary or 2200 volt line on Benedict Ave. south to Olive Street.

This order is effective at once, the above lines having been condemned June 29th, 1925. And will be removed July 29th, 1925.

Yours truly
City of Norwalk,
M. G. Irvin, Sup't.

PLAINTIFF'S EXHIBIT No. 54

CITY OF NORWALK, OHIO
Department of Electricity and Water

July 31, 1925.

The Ohio Electric Power Co., Norwalk, Ohio.
Gentlemen:

The Director of Public Service and Safety has condemned the cable which supplies the Telephone building on Hester St. in accordance with the ordinance passed July 1st, 1925, the last paragraph of Section #9 provides that "Any extension or construction of electric light or power lines for supply or secondary lines, shall be approved by the Director of Public Service before electricity can be turned on, and a permit shall have been applied for and received before work on same is started."

The penalty provides that the city will remove the same after thirty days from the date of this notice.

This refers to the underground extension which was made by your company, extending from the South side of Seminary St. across the street and north on Hester street to the basement of the Telephone Company.

Very truly yours
City of Norwalk
M. G. Irvin, Supt. of Electric Dept.

PLAINTIFF'S EXHIBIT No. 55

CITY OF NORWALK, OHIO
Department of Electricity and Water

September 23, 1925.

Ohio Electric Power Co., Norwalk, Ohio.
Gentlemen:

The Director of Public Service and Safety has ordered me to disconnect and remove the cables and conduits recently constructed by your company on Hester

Street. This was in violation of an ordinance passed by the City Council July 1, 1924, and of which you had notice of condemnation July 31, 1925.

This is for your information and the protection of your customers. This department will get to this work within the next few days.

Very truly yours,
City of Norwalk,
M. G. Irvin, Sup't.

MGI/RB

PLAINTIFF'S EXHIBIT No. 56

CITY OF NORWALK, OHIO
Department of Electricity and Water
September 28, 1925.

Mr. D. E. Turkle
Ohio Electric Power Co.
Norwalk, Ohio
Dear Sir:

In regard to the conduit and cable matter on Hester Street, I took this matter up with our Service Director and notified him that you would disconnect your cable and wish permission to leave it under the street. He, no doubt, will take this up with you within a short while, as he stated he would want to go into it further to see whether it would be in accordance with the ordinance or not.

Yours very truly,
City of Norwalk,
M. G. Irvin, Sup't.

MGI/RB

PLAINTIFF'S EXHIBIT No. 57

CITY OF NORWALK, OHIO
Department of Electricity and Water

October 14, 1925.

Ohio Electric Power Co., Norwalk, Ohio.

Gentlemen:

The Director of Public Service and Safety has condemned the following wires in accordance with the ordinance passed July 1, 1925, and has authorized the writer to order the same removed within thirty days as provided in Section 9 of the above ordinance. This order covers the removal of a three-phase line commencing at North Linwood and Water Street, thence east on Water to Prospect and north on Prospect to League. (There being no three-phase customers on this line.)

The secondary wires on Cline Street from front of 11 Cline, north to Union Street.

Secondary wires on East Elm Street from #27 east to the transformers located in front of number 50.

Secondary wires on Benedict Avenue from Elm Street south to number 133 including a transformer connected to same.

On West Elm Street, one wire of the three wire secondary from Norwood west to Maple Street.

The penalty on this ordinance provides that the above wires are to be removed within thirty days from the date of this notice or the same be taken down by the city, and the material sold to cover the cost of this removal.

Very truly yours,
City of Norwalk,
M. G. Irvin, Sup't.

MGI/RB

PLAINTIFF'S EXHIBIT No. 58

CITY OF NORWALK, OHIO
Department of Electricity and Water

October 22, 1925.

Ohio Electric Power Co., Norwalk, Ohio.

Gentlemen:

The Director of Service and Safety has condemned the secondary wires from South Garden Street and Pine Street to East Main on the first pole south of East Main, and has authorized the writer to order the same removed within thirty days as provided in the ordinance passed July 1, 1924, covering vacant lines.

He also has instructed the writer to remove the cables and conduit under Hester Street which you disconnected and referred to in a letter of a few days ago. He states that the fact that you have disconnected these does not satisfy the provision of the ordinance covering permission for extension of lines on city property.

For your information I would suggest that you get a permit from the Service Director allowing you to open the street and remove this conduit.

Very truly yours,
City of Norwalk,
M. G. Irvin, Sup't.

MGI/RB

PLAINTIFF'S EXHIBIT No. 59

CITY OF NORWALK, OHIO
Department of Electricity and Water

October 31, 1925.

Ohio Electric Power Co., Norwalk, Ohio.
Gentlemen:

The Director of Service and Safety has condemned the secondary wires on Grove Avenue, now vacant, and has authorized the writer to order the same removed within thirty days as provided in the ordinance passed July 1, 1924.

Very truly yours,
City of Norwalk,
M. G. Irvin, Sup't.

MGI/RB

PLAINTIFF'S EXHIBIT No. 60

CITY OF NORWALK, OHIO
Department of Public Service

November 19, 1925.

Ohio Electric Power Co., Norwalk, Ohio.
Attention Mr. D. E. Turkle, Manager.
Dear Mr. Turkle:

Referring to your favor under date of 12th, relative to conditions in connection with the abandoned lines or lines out of service which your company has on certain streets, also referring to the last paragraph relative to a third wire of the secondary line on Elm Street from Norwood to Maple, would advise that so far as the city is concerned it will not be necessary to change any conditions in connection with that line at the present time. We note that this line has been put in a fairly safe condition which will be satisfactory to us.

Very truly yours,
City of Norwalk,
W. P. Leighton,
Director of Public Service.

WPL/RB

PLAINTIFF'S EXHIBIT No. 61

CITY OF NORWALK, OHIO
Department of Electricity and Water

August 12, 1926.

The Ohio Electric Power Co., Norwalk, Ohio.

Gentlemen:

The Director of Public Service and Safety has instructed me to issue the following order owing to the vacating of sections of lines as listed below:

One span of secondary wire from Whittlesey Ave. and Railroad St. across Whittlesey Ave.

Two spans of secondary wire on Franklin St. from Wooster to Foster.

One span of secondary from #98 Prospect to #103 Prospect.

Secondary wires on Milan from Harkness to #69.

One span on W. Washington from #44, west.

All wires on Rose Ave. from Whittlesey to the end.

One wire from the corner of E. Main and Old State Rd. north to the Armstrong residence.

Two wires secondary on N. Linwood from #40 south.

One span from #10 Mill St. to junction with the next secondary service.

On State St. from W. Main to #13.

One wire of the three-wire service on E. Main from #117 west to transformer.

One pole and wires erected to serve #15 Hickory. This is on private property and without the owner's consent.

This order is in accordance with an ordinance passed by Norwalk City council July 1, 1925. Penalty for disobeyance of which provides that these wires will be removed by the city at the expiration of thirty days from date of this notice.

Very truly yours,
City of Norwalk,
M. G. Irvin, Supt.

MGI:RB

PLAINTIFF'S EXHIBIT No. 62

CITY OF NORWALK, OHIO
Department of Electricity and Water
(Copy)

July 30, 1927.

The Local Telephone Co., Norwalk, Ohio.
Attention: Mr. J. O. Campbell.

Genltemen:

The Director of Public Service & Safety of City of Norwalk has authorized the issuance of an order to your company to remove twenty-one (21) poles which you have abandoned and which have been condemned by the Director of Public Service. The poles are located on the south side of West Main Street from Church Street to the pole approximately two hundred (200) feet west of Pleasant Street upon which you now are still maintaining heavy cable diagonally across Main Street from the north side. This is in accordance with an ordinance passed by Council of City of Norwalk under date of July 1, 1924. The penalty for violation of this order is included in the same ordinance and is to the effect that the failure to comply with this order within thirty (30) days from this date, the order shall be carried out by the City under the direction of the Director of Public Service.

This order does not permit the selling of those poles as they now stand to any other utility nor individual with the intent of leaving them erected in the street as they now are, and cannot be construed by you as anything else but the removal of the poles from the street and that within thirty (30) days from date of this order. Any tenants or leases which you may have on that property cannot continue the use of the same after this period without permission from the Service Director.

Very truly yours,
City of Norwalk,
M. G. Irvin, Supt.
B. P. Webster, Director of Public Service.

MGI:RB

PLAINTIFF'S EXHIBIT No. 63

CITY OR NORWALK, OHIO
Department of Electricity and Water

August 16, 1927.

The Ohio Electric Power Co., Norwalk, Ohio.

Gentlemen:

The Director of Public Safety and Service has instructed that the following order be issued, in accordance with an ordinance passed by the council of Norwalk July 1st, 1924.

You are ordered to remove the wires and equipment which are not in use at this time, located on Woodlawn Ave. in the city limits, and extending east from the pole on the east side of the W. & L. E. tracks to the city limits.

Failure to comply with this order will cause the penalty to be inflicted, which is the removal by the city of all equipment coming under this order, if the same has not been done within thirty days after the date of this order.

Very truly yours,
City of Norwalk,
M. G. Irvin, Sup't.

PLAINTIFF'S EXHIBIT No. 64

CITY OF NORWALK, OHIO
Department of Public Service

September 22, 1927.

Ohio Electric Power Co., Norwalk, Ohio.
Attention: Mr. D. E. Trukle, Manager.

Gentlemen:

My attention, as Director of Public Service, of City of Norwalk, Ohio, has been called to the fact that the employees of your company are now engaged in removing certain poles or other supporting fixtures now or

formerly owned by the Local Telephone Company on East Main Street in the City of Norwalk.

You are hereby notified to discontinue the carrying out of said changes and replacements. This order not only applies to the work on East Main Street, but also to any work of like nature contemplated in said City of Norwalk, Ohio. Please acknowledge receipt of this order.

Very truly yours,
City of Norwalk,
B. P. Webster,
BPW:RB Director of Public Service & Safety.

PLAINTIFF'S EXHIBIT No. 65

Norwalk, Ohio, September 26, 1927.

Director of Public Service,
City of Norwalk, Ohio.
Dear Sir:

We acknowledge receipt of your letter of September 22nd, protesting repairs now being made upon our lines on East Main Street in the City of Norwalk, and protesting similar work in the City on other streets and public places.

This is to notify you that the changes contemplated and proposed to be made at this time, are the repairing and re-conditioning of the lines of the Company upon the streets and other public places of the City of Norwalk, Ohio.

Yours truly,
Ohio Electric Power Co.,
By.....

PLAINTIFF'S EXHIBIT No. 66

CITY OF NORWALK, OHIO
Department of Electricity and Water

October 6, 1927.

Ohio Electric Power Co., Norwalk, Ohio.
Gentlemen:

The Director of Public Service & Safety has authorized me to order the removal within thirty (30) days of a two-wire primary line starting at the Wheeling & L. E. R. Co. on Woodlawn Ave. with a transformer and secondary that formerly served the residence of Mr. Armstrong on Woodlawn Ave., back to house No. 156 Woodlawn Ave.

Also the secondary wires from #132 N. Hester St. to the corner of N. Hester and League St. thence west on League to #23 W. League St.

Secondary wires on N. Prospect from the transformer at School House north to #98 Prospect St.

Also secondary wires on Franklin St. from the corner of Franklin and Whittlesey Ave. One span east and the service wires to the rear of the brick building which faces Whittlesey Ave.

This is in accordance with an ordinance passed by the City Council July 1, 1924, and failure to comply with this order will cause the penalty to be inflicted which is the removal by the city of all equipment coming under this order if the same has not been done within thirty (30) days after date of this order.

Very truly yours,
City of Norwalk,
M. G. Irvin, Supt.

MGI:RB

PLAINTIFF'S EXHIBIT No. 67

CITY OF NORWALK, OHIO
Department of Public Service

Aug. 30, 1928.

The Ohio Electric Power Co., Norwalk, Ohio.

Gentlemen:

The City of Norwalk has awarded the contract for the improvement of North Linwood Avenue between East Monroe Street and Railroad Ave., by paving with concrete, plans for same being on file at this office.

Whereas you have poles and equipment on the east side of said street in the way of this improvement, it will be necessary for you to move the same within ten days from date of this notice.

You are to assume all liability and expense incidental with the moving of the above pole lines and equipment and hold the City of Norwalk free from any and all expense occasioned by your failure to comply with this order.

Very truly yours,
City of Norwalk,
B. P. Webster,
Director of Public Service.

PLAINTIFF'S EXHIBIT No. 68

CITY OF NORWALK, OHIO
Department of Public Service

March 29, 1929.

To the Ohio Electric Power Co.

Our attention has been called to the fact that you are violating the City ordinance by building and extending your electric light lines and installing lights.

Will you kindly refrain from extending new lines and installing lights until the court gives you permission to extend said lines.

Dated this 29th day of March, 1929.

P. E. Weidemaier, Mayor.

PLAINTIFF'S EXHIBIT No. 69

April 20, 1929

Mr. Max G. Irvin, Supt.
City Light & Water Depts.,
Norwalk, Ohio
Dear Sir:

I wish to take this opportunity to call to your attention the condition existing on West Main Street where the 2300 volt primary lines belonging to the city and those belonging to the Ohio Electric Power Company, both of which are on the same poles, cross the Wheeling Lake Erie Railroad.

I notice that the railroad, telephone and telegraph crosses above our 2300 volt circuits. This is contrary to state law and we wish to eliminate the condition at once if at all possible.

We will be glad to cooperate with you in this matter, bearing one half of the expense which would be necessary.

Trusting that I may have an early reply on this subject, I remain

Sincerely yours,
L. L. Stahler

LLS:MEL
C/c J.N.H.

PLAINTIFF'S EXHIBIT No. 70

O.K. as to form—H. C. L., E. F. B.

COUNCIL RECORDS

Norwalk, Ohio, Feb. 4th, 1896.

The Council of the City of Norwalk, Ohio, met in regular session with the following members present: Bloxham, Jump, Kirkland, Lee, Moore, Prentiss, Somers.

Absent, Owen, O'Brien, Tuttle.

President Prentiss in the Chair.

* * * * *

(P. 425)

The following invitation was received from the Northern Electric Company, and on motion of Moore, seconded by Bloxham, was accepted for Friday evening, February 7th, 1896.

Honorable City Council, Norwalk, Ohio.

Gentlemen:

Having completed, and in operation our new lighting plant, an inspection of same by your Honorable Body is invited.

Very truly,

The Northern Electric Company,

B. P. Foster, Secy. & Treas.

Norwalk, Ohio, Feb. 4th, 1896.

* * * * *

(P. 431)

On motion of Bloxham, seconded by Moore, the Council adjourned.

A. S. Prentiss,

President of the Council.

Attest: F. W. Christian, City Clerk.

PLAINTIFF'S EXHIBIT No. 71

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 1040

The Equitable Trust Company of New York,
Plaintiff,

vs.

City of Norwalk, Ohio,
Defendant.

STIPULATION

It is hereby agreed and stipulated by and between Counsel for the plaintiff and Counsel for the defendant in this case that on the 11th day of May, 1896, F. H. Jones and J. W. Foster, as assignees of The Incandescent Light and Power Company, and others, as appellants, filed in the Court of Common Pleas of Huron County, Ohio, the original papers, pleadings and journal entries duly certified of a certain action theretofore commenced in the Probate Court of Huron County, Ohio, wherein said J. W. Foster and F. H. Jones, as assignees, were plaintiffs and The Norwalk Foundry & Machine Company, et al., were defendants, which action had been appealed to said Court of Common Pleas; that the original petition, certified from said Probate Court to said Court of Common Pleas on appeal, alleged the appointment and qualification of said Foster and Jones, as said assignees; and that among the assets of the assignment of the property of The Incandescent Light & Power Company to said assignee was

"an electric lighting plant, consisting of a leasehold estate for the period of five years from the 22nd day of September, 1890, of the following described property: Situated in the County of Huron, City of Norwalk, and State of Ohio, and being forty feet off the east end of Lot No. 934, situated on the south-east corner of Benedict Avenue and Seminary Street in said City, with privilege of drive on east end of said lot No. 934, together with all buildings thereon, boilers, engines, dynamos, street wires, poles, lamps and all appliances and articles of every kind and description used in and about the business of furnishing arc and incandescent lighting,

and all franchises, patronage, good-will and rights of said business."

That said petition further alleged that The Norwalk Foundry & Machine Company, The Bodifield Belting Company and D. H. Fox, Trustee, had or claimed to have liens on said property, or some part of it, to secure a claimed indebtedness to them respectively by the said The Incandescent Light & Power Company; and that the prayer of said petition was, in substance, that said assignees be ordered to sell said property free from the liens of the defendants, that said liens be considered, and their respective priorities determined and their payment ordered out of the proceeds of the sale of said property.

That by leave of court, one W. R. Huntington filed in said action his answer and cross-petition alleging the existence of a mechanic's lien upon said property; and that the certain claim and lien of said The Bodifield Belting Company had been duly assigned to said Huntington.

That prior to said appeal, to-wit: April 24, 1893, said Probate Court, by its decree, ordered said assignees to sell at public sale said property, described as follows:

"An Electric-Light Plant, consisting of a leasehold estate for the period of five years from the 22" day of September, 1890, of the following described property: Situated in the County of Huron, City of Norwalk, and State of Ohio, and being forty feet off the east end of lot No. 934; Situated on the southeast corner of Benedict Avenue and Seminary Street in said City, with privilege of drive on east end of said lot No. 934, together with all buildings thereon, boilers, engines, dynamos, street wires, poles, lamps, and all appliances and articles of every kind and description used in about the business of furnishing arc and incandescent lighting and heat, and all franchises, patronage, good-will, and rights of said business."

That prior to the perfection of said appeal, to-wit: May 10, 1893, said D. H. Fox, trustee, filed in said Probate Court, in said action, his separate answer wherein, among other things, he alleged that on or about June 1, 1892, said The Incandescent Light & Power Company by the action of its stockholders and board of directors, taken in conformity with law, had authorized the execution and delivery to a trustee of its bonds in the sum of $20,000.00, payable five years after date, with interest, and that said bonds be sold and the proceeds be applied to the payment of a promissory note of said The Incandescent Light & Power Company secured by the personal

endorsement of its stockholders and, also, all other indebtedness; and that, to secure the payment of said bonds and interest accruing thereon, there should be executed and delivered to said trustee the mortgage deed of said The Incandescent Light & Power Company conveying to said trustee all the property of said The Incandescent Light & Power Company, both real and personal

"including its leasehold interest, buildings thereon, machinery, electrical appliances, and apparatus, its arc and incandescent street and commercial lines and all its privileges, rights and franchises."

That said D. H. Fox, Trustee, further alleged in his said separate answer that on or about June 1, 1892, in compliance with the action of its stockholders and board of directors, said The Incandescent Light & Power Company, by D. W. Vail, its President, and Charles Suhr, its Secretary, executed and delivered to said D. H. Fox, Trustee, forty bonds of said Company of $500.00 each, each bond bearing ten interest coupons and said bonds being payable to D. H. Fox, Trustee, or bearer, a full description of each bond and the coupons thereon being set forth in the answer of said D. H. Fox, Trustee; and that, to secure the payment of said bonds and interest coupons, said The Incandescent Light & Power Company, simultaneously with the delivery of said bonds to said Trustee, duly executed and delivered unto said Trustee its mortgage deed, describing the following property, to-wit:

"Situated in the City of Norwalk, County of Huron, and State of Ohio, and being forty feet off the east end of Lot No. Nine hundred and thirty-four (934) situate on the south-east corner of Benedict Avenue and Seminary St.; said leasehold interest being a five year lease from Sept. 22nd, 1890, with a renewal of five years if not sold, together with all its buildings thereon, its machinery, electrical appliances and apparatus, its arc and incandescent street and commercial lines, and all its privileges, rights and franchises."

That, in his separate answer, said D. H. Fox, Trustee, further alleged that said mortgage deed was conditioned that if said The Incandescent Light & Power Company should well and truly pay said bonds and coupons according to the tenor thereof, and keep, observe and perform the other covenants and obligations of said mortgage deed, then the same should be null and void, but otherwise to remain in full force and virtue; that said D. H. Fox, in writing, on said mortgage deed, ac-

cepted the office of such Trustee; that on June 16, 1892, at 3:30 o'clock P.M., said mortgage deed was duly left for record at the office of the County Recorder of said Huron County and was thereafter duly recorded in Volume 35, page 602, of the Mortgage Records of said County; that prior to the first day of December, 1892, said Trustee had sold all of said bonds and applied the proceeds thereof, as authorized by the stockholders and board of directors of said The Incandescent Light and Power Company; and that said bonds were owned and held by divers individuals and corporations, and that none of them, either bonds or coupons, had been paid.

That said D. H. Fox, Trustee, in said action prayed for the sale of said property of The Incandescent Light & Power Company and for the application of such amount from the proceeds of such sale as would fully pay and satisfy the amount owing on said bonds and coupons.

That the record of said action commenced in said Probate Court and appealed to said Court of Common Pleas shows that on the first day of June, 1893, said F. H. Jones and J. W. Foster, Assignees, returned said order of sale to said Probate Court, pursuant to the order of said Court to return the same, without offering said property for sale and without further proceedings under said order.

That various answers and cross-petitions were filed in said action in said Probate Court by creditors and alleged lienholders of said The Incandescent Light & Power Company.

That in said action in said Probate Court, said F. H. Jones and J. W. Foster, Assignees, filed their reply to the answer of D. H. Fox, Trustee, traversing said answer and raising an issue as to the validity of said bonds and mortgage.

That on the 24th day of January, 1895, said Assignees filed their application in said Probate Court for an alias order of sale of the property of said The Incandescent Light & Power Company, and on said last named date an alias order of sale was issued by said Probate Court to said Assignees commanding them to proceed according to law to sell at public sale the said property described, to-wit:

"An electric light plant, consisting of a leasehold estate for the period of five years from the 22nd day of September, 1890, of the following described property: Situated in the County of Huron, City of Norwalk and State of Ohio, and being forty feet off the east end of

Lot No. 934, situated on the southeast corner of Benedict Avenue and Seminary Street in said City, with privilege of drive on East end of said lot No. 934, together with all buildings thereon, boilers, engines, dynamos, street wires, poles, lamps and all appliances and articles of every kind and description used in and about the business of furnishing arc and incandescent lighting and heat, and all franchises, patronage, good-will and rights of said business."

That notice of said sale advertised to take place March 1, 1895, with proof of publication of said notice, was filed in said action in said Probate Court February 26, 1895; and that on the 11th day of March, 1895, said Assignees in said action in said Probate Court filed their return of said order of sale showing that the property, above described, including

"all franchises, patronage, good-will and rights of said business"

of The Incandescent Light & Power Company, was sold March 1, 1895, to George P. Jones and Mayme C. Foster for the sum of $13,000.00.

That on the third day of August, 1895, L. C. Laylin filed his answer and cross-petition in said action, then pending in said Probate Court therein, among other things, alleging that in May, 1894, said D. H. Fox died, whereby the office of Trustee, as set forth in his said separate answer, became vacant; that said L. C. Laylin was the duly appointed and qualified successor of said Fox as said Trustee; and that said Laylin, as Trustee, adopted and affirmed for his own in said action the answer of said D. H. Fox, as Trustee, and denied the averments contained in the reply to the separate answer of D. H. Fox, Trustee, affecting the validity of said bonds and mortgage.

That said action in said Probate Court came on for hearing on the first day of February, 1896, and was submitted to the Court, and on the 13th day of April, 1896, said Probate Court made a finding in favor of said W. R. Huntington on his mechanic's lien for the sum of $760.91 and found said mechanic's lien to be the first and best lien on the said property of The Incandescent Light & Power Company; that D. H. Fox, Trustee of the bondholders of said Company, held a valid second lien on said property for the sum of $20,000.00; and that other lienholders held junior liens thereon, and the Court ordered paid from the proceeds of the sale of said property said liens in the order of their priority, so far as said proceeds would reach.

That, after the taking and perfection of said appeal, said action came on for hearing in said Court of Common Pleas, and on the 27th day of April, 1897, said last named Court entered its finding and decree in effect and substance that said W. R. Huntington held the first and best lien on said property of The Incandescent Light & Power Company; that said D. H. Fox, Trustee of the bondholders of The Incandescent Light & Power Company, was deceased, and Lewis C. Laylin, his successor, held the second lien for the sum of $20,000.00 on said property; and thereupon said Court of Common Pleas entered its decree ordering the distribution of the proceeds of said sale according to said findings.

Earl F. Boxell,
Of Counsel for Plaintiff.
W. A. Eversman,
Counsel for Defendant.

PLAINTIFF'S EXHIBIT No. 76

FAUVER & CHENEY
Attorneys at Law, Elyria, Ohio

February 4, 1925

Seibert & Riggs,
2 Rector St.,
New York City
Gentlemen:

We have your letter of February 2nd relating to our opinion as to title of property recently purchased by Victor Emanuel from the Railway Company, and it is quite possible that the phraseology of our letter can be changed so as to meet the conditions of the mortgage requirements; however, back of the entire situation is the fact that we have no legal title to certain parts of the right-of-way we are now enjoying. As stated in our

opinion, we have a full right to occupy this right-of-way without any possibility of ejectment, but may be forced to appropriate it upon the application of the owners of the property at some time in the future. In that event, the value which a jury would probably give would be a nominal one.

Relating to the lease which has expired, we do not understand that this property is at all essential in connection with the operation of the plant, altho it has been used to some extent. If deemed advisable, reference in the opinion to this lease might be entirely eliminated.

While we enjoy no franchise from the City of Norwalk, still under the law in Ohio we have the full right to continue our operations in the same manner, and to the same extent as our predecessors have operated.

It rather seems as though we should be able to furnish an opinion to the Trustee which would substantially cover the requirements of the mortgage provision and still conform to the facts. It hardly seems as though the Trustee would raise any question with reference to any of these matters. We presume this opinion will be desired at the time the bonds are to be taken down.

In the meantime, we suggest that you prepare the kind of an opinion which you think would be sufficient, and which, under the circumstances, we should be able to sign, with due reference to the facts and the law, and forward it to us; or, in the event you prefer, we will redraft the opinion previously rendered. We presume this opinion should be addressed to the Trust Company, who will act as Trustee under the Bond issue.

Very truly yours,

Fauver & Cheney.

PLAINTIFF'S EXHIBIT No. 77
(Copy)

September 29th, 1917

Frank H. Ginn, Esq.,
Twelfth Floor, Williamson Bldg.,
Cleveland, Ohio.
Dear Mr. Ginn:

A long time ago, as you will remember, you asked me to carefully make a search of the City Council Records of the City of Norwalk, with reference to the franchise rights granted to such electric light companies as were predecessors in business of The Cleveland, Southwestern and Columbus Railway Company.

In my last conference with you, it seemed as if the investigation you requested would be an easy task, but I have found it quite difficult, in that the first electric light contracts, which the City of Norwalk made, were away back in the eighties, and more than that, the municipal officers failed to keep any index to the Council Journals, and the result was that I went over these records page by page, commencing with the first electric light contract and coming down to and including the contract, which was made with The Northern Electric Company, later known as The Northern Electric & Gas Company, which sold, as I understand, all of its property, interests and franchises to The Cleveland and Southwestern Railway Company, before it changed its name to The Cleveland Southwestern & Columbus Railway Company.

So that you may have a complete record of the proceedings of the City Council, I have had my stenographer copy everything from the records germane to the lighting situation, during the period above mentioned.

Also, I have carefully examined all of the ordinance books, covering the same period, and everything done by the Council, in the matter of electric lighting, commencing with September 7, 1886, and ending with July 16, 1895, which is of record, appears in the transcript of council proceedings which I am submitting to you herewith, covering forty-six pages.

Inasmuch as you will not want to spend your time in reading this entire transcript, I have indicated the most important steps taken by the Council by making red stars in the margin of the transcript.

The records show that prior to October, 1886, the streets of the City of Norwalk, were lighted with gaso-

line and gas lamps. Page 2 of the transcript shows that on October 2, 1886, a certain proposition of Western Electric Company of Chicago to furnish street lighting was accepted, and that a contract therefor, to commence on the 31st day of December, 1886, was entered into.

Neither in the Council journals, nor in the ordinance books, is there any record of the passage of any ordinance, relative to the granting of any franchise to Western Electric Company for any kind of electric lighting or service. The contract for street lighting entered into with Western Electric Company and dated October 19, 1886, as shown by pages 2 and 3 of the transcript, appears to have been authorized by the passage of a resolution only.

I find nothing of record indicating that Western Electric Company was engaged in incandescent lighting. Page 3 of the transcript shows on November 6, 1886, a written resolution was submitted to the Council for passage by a representative of Western Electric Company substituting the name "Norwalk Light & Power Company" for Western Electric Company. You will note that the same page shows that on November 17, 1886, the committee to which such resolution was submitted reported against its adoption.

It had been my understanding that the City of Norwalk, at one time, had a contract with Norwalk Light & Power Company, but I have been advised by Mr. Charles Suhr, a lawyer of this city, who was one of the incorporators and an officer of The Incandescent Light & Power Company of Norwalk, hereinafter referred to, that Norwalk Light & Power Company was the name given by Western Electric Company of Chicago to the persons interested in the management and operation of the local plant of Western Electric Company, in the carrying out of the contract of Western Electric Company for city street lighting.

I find nothing in the council records or ordinance books to show that the City of Norwalk ever had any lighting contract or arrangement with, or ever granted any franchise to, Norwalk Light & Power Company.

Mr. Suhr advises me that the parties doing business as The Norwalk Light & Power Company, in Norwalk, carried out the contract for city lighting made with Western Electric Company, as above stated. Mr. Suhr further advises me that he does not think that Western Electric Company ever furnished any incandescent lighting for the City of Norwalk. By referring to page 5 of the transcript, you will find that Western Electric Com-

pany, on June 30, 1887, submitted to the City Council a written proposition to sell to the City
"the plant complete, including all of the apparatus used for street and commercial lighting, building, &c. in fact the entire outfit as it now stands, for the sum of $27,-000.00."

Mr. Suhr advises me that the "plant" referred to was the one, which had previously been used by Norwalk Light & Power Company, and he further says that he does not remember whether Norwalk Light & Power Company was engaged in commercial lighting. The language contained in the proposition of Western Electric Company in its offer to sell the plant would indicate that it was engaged in "commercial lighting."

At pages 6 and 7 appears an ordinance granted to The Northwestern Ohio Natural Gas Company by the City of Norwalk, on July 23, 1889, and which only relates to the laying of gas pipes in the streets, alleys, etc., for the furnishing of natural gas. I think that no importance attaches to this ordinance, but I only put it in the transcript as I came to it, because of the fact that The Northern Gas & Electric Company, the grantor to The Cleveland and Southwestern Railway Company, became the grantee of certain rights of The Northwestern Ohio Natural Gas Company, which will be referred to later in this letter. Pages 9 and 10 show another and later ordinance granted to The Northwestern Ohio Natural Gas Company by the Council, on April 23, 1890, granting to that Company the right to lay, maintain and operate gas pipes in the City of Norwalk, for heating, power and fuel purposes. No importance need be attached to this ordinance.

Page 11 of the transcript shows the commencement of some agitation in July, 1890, for a new lighting arrangement for the city, and at the bottom of page 11, you will find that an ordinance was introduced in the City Council, on July 25, 1890, to grant certain privileges to "Norwalk Incandescent Light Company."

By referring to page 12 of the transcript, you will find on July 30, 1890, said ordinance was read the third time, and then passed, the ordinance being given in full on page 13 of the transcript. Careful attention should be given to this ordinance, as it may figure very materially in the present situation. You will note that this ordinance apparently has something omitted from it, opposite the red ink line in the margin, thereby making the ordinance practically unintelligible. You will, also, note that this ordinance was granted to "Norwalk In-

candescent Light Company of Norwalk, Ohio, its successors and assigns." So far as I can ascertain, there was no corporation engaged in business under the style of "Norwalk Incandescent Light Company."

Enclosed, you will find a duly exemplified copy of the articles of incorporation granted to The Incandescent Light and Power Company, of Norwalk, Ohio, under date of March 7, 1891. Therefore, it is quite obvious that the ordinance on page 13 of the transcript, passed July 30, 1890, was not an ordinance passed for the benefit of The Incandescent Light and Power Company of Norwalk.

By referring to page 15 of the transcript, you will note that on October 7, 1890, the council of the City of Norwalk, passed an ordinance to amend the ordinance of July 30, 1890, and evidently to correct the mistakes made in the former ordinance, the latter ordinance being granted to "The Incandescent Lighting Company of Norwalk." I am unable to find that there was ever any Company engaged in business under the style of "The Incandescent Lighting Company."

You will, also, note that the two ordinances, set forth respectively on pages 13 and 15, granted franchises for a limited period of twenty years, notwithstanding the fact that, as decided by the Supreme Court in Hardin-Wyandot Light Company vs. Upper Sandusky, 93 O. S. 428, prior to the Act of 1896, now Sections 9192, 9193 and 9194, General Code, an electric light company could place electric wires for lighting, heating or power purposes in the streets of a municipality, without obtaining the consent of the municipality therefor.

I am unable to find in any of the council journals any acceptance in terms by any one of the said two ordinances of July 30, 1890, and October 7, 1890. This apparent mystery as to Incandescent Light Company of Norwalk and Incandescent Lighting Company of Norwalk becomes still more mysterious by a reference to page 16 of the transcript, showing that at a council meeting held November 5, 1890, a written proposition for lighting was submitted to the Council by The Electric Light and Power Company. Who constituted The Electric Light and Power Company does not appear.

In my conversation with some of the older residents of Norwalk, it appears that in those days when municipal electric lighting was just coming into vogue, different individuals conceived the idea of organizing a company or corporation to engage in electric lighting and the use of these various names may be explained upon

the theory that different individuals or collections of individuals assumed to act under these names for the purpose of obtaining a franchise from the city either for their own use or for speculative purposes, intending to sell the same to other parties.

You will, also, note that on page 16 of the transcript, there is an acceptance of the proposition of The Electric Light & Power Company, and you will, also, note by referring to page 17 that on December 16, 1890, there was a proposition submitted to the council by The Incandescent Light Company, and you will further note that as appears from Page 17 of the transcript, on May 5, 1891, just about two months after the Incandescent Light & Power Company was incorporated steps were taken by the city to advertise for bids for the lighting of the streets of Norwalk for five years commencing January 1st, 1892, and you will further note by referring to the bottom of page 18 of the transcript that on June 16, 1891, bids for lighting the streets with electric lights for a period of five years were received from Norwalk Light & Power Company, Norwalk Gas Light Company and Incandescent Light and Power Company.

I desire to say that The Norwalk Gas Light Company was an old corporation, which for many years manufactured gas in this city, and supplied it thru pipes laid in the streets for public and private use. The Norwalk Gas Light Company never engaged in any electric lighting business but it finally sold all of the rights that it had in the street for gas purposes to The Northern Electric Company, from which The Cleveland and Southwestern Railway Company obtained all rights owned formerly by the Gas Company. The sale by the Gas Company was made to Parks Foster in the first instance, and then by him to the Railway Company.

As stated above in this letter, The Norwalk Light and Power Company, so Mr. Suhr advises me, was simply a subsidiary of Western Electric Company of Chicago. By referring to page 21, you will note that another proposition was received by the City of Norwalk, on September 1st, 1891, for public lighting from The Norwalk Incandescent Light Company, and you will further note that none of the bids received for electric lighting prior thereto seemed to have been accepted, but that it was decided to advertise for contracts for street lighting the second time.

By referring to the bottom of page 24 and the top of page 25 of the transcript, you will note that on October 2, 1891, the council authorized the execution of a

contract between the City and The Incandescent Light and Power Company for the period of five years from and after December 31, 1891. I do not find any ordinance or authority of any kind granted by the City Council to The Incandescent Light and Power Company for the maintenance of any poles, wires or other fixtures in the streets of the City of Norwalk; but I am advised by Mr. Suhr, who was secretary of The Incandescent Light and Power Company, that about the time it was granted a contract for street lighting, it proceeded to erect poles and string wires and install the necessary equipment for incandescent lighting and for the purpose of supplying electricity for power purposes to private consumers, and that the poles, wires and equipment so erected and installed were the same poles, wires and equipment, which were subsequently purchased by Mrs. Foster and one George P. Jones and later turned over to The Northern Electric Company, when it commenced to do business in Norwalk, as is hereinafter shown.

Mr. Suhr further advises me that his recollection is that for some time—perhaps a year or so—after The Incandescent Light and Power Company commenced to light the streets under its contract with the city and to furnish electricity for commercial purposes, The Norwalk Light and Power Company acting under Western Electric Company used some of the poles, which had formerly belonged to and had been used by Western Electric Company, but that finally all of the public and commercial lighting was supplied by The Incandescent Light and Power Company.

Page 27 of the transcript shows that notice was given the council of the City of Norwalk on February 25, 1893, that The Incandescent Light and Power Company had made an assignment for the benefit of its creditors.

Page 28 of the transcript shows that the assignees of The Incandescent Light and Power Company indicated their willingness to continue to operate under the contact entered into between the city and The Incandescent Light and Power Company, and I am advised that the assignees under authority granted by the Probate Court, did carry out that contract until the property was sold by the assignees under the order of the Court.

Pages 30 and 31 of the transcript show that on October 15, 1894, an ordinance was granted to The Cooperative Construction and Supply Company, giving it the right for 25 years from the date thereof to maintain

its lines in the streets of the city for conducting electricity for power, heat and light.

This ordinance appears to have been accepted by The Co-operative Construction and Supply Co., on Nov. 20, 1894, as will be seen by referring to page 31 of the transcript. I am unable to ascertain who the parties were constituting The Co-operative Construction and Supply Co., save that its president was one William J. Bowen and its secretary was one William S. Bayley. These parties were non-residents and inasmuch as I was living in Norwalk at the time said last-named ordinance was passed, and have been here ever since, I am satisfied from my own knowledge, that The Co-operative Construction and Supply Co. never operated any lighting plant in the City of Norwalk, and I am very well satisfied that it never availed itself of any of its franchise rights in the way of operating under said ordinance.

Pages 32 and 33 of the transcript show that commencing in April, 1895, agitation was again started in the City Council, with reference to making another contract for municipal street lighting, and that one B. P. Foster, who afterwards was instrumental in organizing The Northern Electric Company was then making overtures to the City for a new lighting contract.

At a council meeting held on May 21, 1895, shown by page 33 of the transcript, two bids were received by the City for street lighting, one from The Northern Electric Company, and one from The Norwalk Light and Power Company, and the same page shows a report of a special committee appointed by the council, under date of June 4, 1895, recommending that the written proposition of The Northern Electric Company, dated June 4, 1895, be accepted, such proposition appearing on page 34 of the transcript.

Pages 36 and 37 show another proposition submitted by The Northern Electric Company, by B. P. Foster, Secretary.

Page 39 shows an ordinance passed on the second day of July, 1895, authorizing the making of a contract with The Northern Electric Company, for electric lighting for streets and public places of the city for a period of ten years commencing Sept. 1, 1895, but containing nothing relative to commercial or incandescent lighting.

Pages 39 and 40 show that said ordinance after it was originally passed was passed again after having been read on three different days.

Page 41 shows that a bond was filed by The Northern Electric Company, and pages 42 and 45 inclusive,

show the contract, which was entered into by and between the City of Norwalk, and The Northern Electric Company to cover street lighting only for the period of ten years.

Inasmuch as I understand that The Cleveland and Southwestern Railway Company (later The Cleveland, Southwestern and Columbus Railway Company) acquired from The Northern Electric Company, later known as The Northern Electric and Gas Company, all of its rights of every nature and kind in the City of Norwalk, I did not deem it necessary to search the records any further, but I call your attention to some matters of record, which I think I referred to in my letters written to you last spring, to-wit:

In a prior letter, I wrote you fully relative to a deed, which was executed by J. W. Foster and F. H. Jones, as assignees of The Incandescent Light and Power Company to George P. Jones and Mayme C. Foster, the latter being the wife of Burton P. Foster, which deed was recorded in Volume 51 of the Records of Deeds of Huron County, and at pages 319 and 320 therein. This deed, among other things, recites that J. W. Foster and F. H. Jones were duly appointed and qualified as assignees of The Incandescent Light and Power Company; that they filed their petition in the Probate Court of Huron County, on March 29, 1893, praying for an order of sale to sell the real estate and other property of said Company; that said order of sale was granted; and that after due advertisement said assignees sold said property to George P. Jones and Mayme C. Foster for $13,000.00, and that the said sale was confirmed.

I gave you in one of my former letters a copy of the description of the property, which included "all poles and wires belonging" to the plant with all other fixtures and appurtenances thereunto belonging.

There is no mention made of any franchise in the deed.

It will be noted that this deed was executed and delivered to George P. Jones and Mayme C. Foster before it was necessary for an electric light company to obtain the consent of the city council to erect its poles and string its wires in the streets. As stated in one of my former letters, the same property was transferred by the deed of George P. Jones and Mayme C. Foster to The Northern Electric Company on May 20th, 1895.

This is substantially all the matters of record that I have been able to find, after a most careful and diligent search covering the period above named.

After giving this matter considerable consideration and thought, I am still of the opinion that, inasmuch as The Incandescent Light and Power Company by the erection of its poles and wires in the streets of the City of Norwalk, aside from those used for public lighting, at a time when it was not necessary to obtain the consent of the municipal authorities, said Company acquired certain vested rights, which would pass as incidents and appurtenances in the deed executed by its assignees to George P. Jones and Mayme C. Foster, and that those vested rights have passed along down to the present owner, The Cleveland, Southwestern & Columbus Railway Company, unless it or its predecessors in title have done something whereby those rights have been divested.

Of course, the question is a very close one, and under all the circumstances of the present situation, a court might hold that The Cleveland, Southwestern & Columbus Railway Company has now no right to maintain its equipment in the streets and public places of Norwalk; but it seems to me that in view of the law, as it stood prior to 1896, and with a large number of customers, who are connected with, and are receiving light and power from, the plant of The Cleveland, Southwestern & Columbus Railway Company, a court would be slow to hold that such Company now has no vested rights in the City of Norwalk.

The question is a debatable one, and before any large amount of money is expended for improvement, which Mr. Frederici tells me are badly needed, it must be appreciated by the directors of the Company that the question is not free from doubt.

It does not seem to me that any court, in view of the law prior to 1896, and the large number of customers now receiving their supply of electricity from The Cleveland Southwestern and Columbus Railway Company would oust the Company from the use of the streets.

I think that the present municipal authorities have been banking somewhat upon the language contained in the contract made with The Cleveland and Southwestern Traction Company, on April 13, 1905, a copy of which you have, wherein in paragraph 14 thereof, there is a provision that after August 31, 1915, nothing shall prevent the city from revoking the contractors' rights to the use of said streets, alleys and other public places in the furnishing of

"street, commercial and residence lighting to the said city, and the residents and inhabitants thereof."

While the use of this language is unfortunate, inas-

much as the contract only covers street lighting, it does not seem to me that it is subject to such construction as would result in the removal of electrical equipment belonging to the contractor, and erected by it in the streets outside of, and independently of, said contract of August 13, 1905.

Anyhow, inasmuch as more than two years have elapsed since the expiration of that contract, I am strongly inclined to the opinion that the city has waived its right to act thereunder in the matter of ordering and effecting a removal of said equipment.

Of course, I am only giving you my opinion, and I appreciate that the question is more or less debatable.

L. Yours very truly,

PLAINTIFF'S EXHIBIT No. 78

OHIO ELECTRIC POWER COMPANY
First Mortgage Gold Bonds
Series "A" 6½% Sinking Fund

Dated July 1, 1924. Due July 1, 1944.

Interest payable January 1 and July 1. Coupon bonds in interchangeable denominations of $1,000, $500 and $100. $1,000 bonds registerable as to principal only. Redeemable at the option of the Company in whole or in part on any interest date on thirty days' notice, at 105 and interest. Interest payable at the option of the holder at New York or Chicago. Principal payable at the office of The Seaboard National Bank of The City of New York, Trustee.

Interest payable without deduction for normal Federal Income Tax not to exceed 2%.

Pennsylvania Four Mill Tax and Massachusetts 6% Income Tax refundable to holders resident in those states.

The issuance of these bonds has been authorized by the Ohio Public Utilities Commission.

The following information is summarized by Mr. Victor Emanuel, Vice-President, from his accompanying letter to us and from auditors' and appraisers' reports and other reliable sources:

Business: The Company supplies, without competition, electric light, power and gas in the city of Oberlin and electric light and power in the towns of Ravenna and Mantua, and in other territory adjacent to Ravenna, Ohio. The Company also serves, both at wholesale and retail, electric consumers in an extensive territory in Mercer, Auglaize, Shelby and Darke Counties, Ohio.

The territory served by the Company includes important agricultural and industrial districts in the north central and the west central portions of Ohio, and is provided with unusually good railroad and interurban transportation. Oberlin is the seat of the well-known Oberlin College, which has an enrollment of approximately 1,000 students.

Security: The First Mortgage Gold Bonds are secured by a direct first mortgage upon the entire fixed property of the Company, which, as appraised by independent public utility engineers and appraisers, is valued largely in excess of the total outstanding funded debt of the Company.

Earnings: Consolidated earnings of the properties now owned by the Ohio Electric Power Company have been as follows:

	Twelve months ended April 30, 1925
Gross Earnings	$380,886
Operating Expenses and Taxes (Including Current Maintenance and Taxes other than Federal Income Taxes)	272,310
Net Earnings	$108,576
Annual Interest on $949,000 First Mortgage 6½% Bonds (this issue)	61,685

Sinking Fund: On July 1, 1925, and on each July 1 thereafter to and including July 1, 1929, the Company covenants to pay to the Trustee as a Sinking Fund for the Series "A" Bonds, an amount equivalent to 1% of the greatest principal amount of the Series "A" Bonds outstanding at any time during the preceding twelve months; and on July 1, 1930, and on each July 1 there-

after to and including July 1, 1934, an amount equivalent to 1½% of such principal amount of Series "A" Bonds; and on July 1, 1935, and on each July 1 thereafter to and including July 1, 1939, an amount equivalent to 2% of such principal amount of Series "A" Bonds; and on July 1, 1940, and on each July 1 thereafter to maturity an amount equivalent to 2½% of such principal amount of Series "A" Bonds.

All monies in the Sinking Fund are to be used exclusively for the purchase or redemption of bonds of Series "A" at or below their redemption price, and all bonds so acquired are to be cancelled.

Management: The general operation of these properties will continue under the supervision of public utility operators whose successful and efficient management of important public utility companies has been demonstrated over a long period of years.

All legal details in connection with this issue have been passed upon and approved by Messrs. Pam & Hurd, Chicago, for the Bankers, and Messrs. Seibert & Riggs, New York, for the Company. The principal properties of the Company have been reported upon by Day & Zimmermann, Inc., Engineers, Philadelphia. The books and accounts of the Company are audited annually by Messrs. Arthur Young & Company, New York.

Price on Application

A. C. ALLYN and COMPANY
Established 1912
Investment Securities
67 West Monroe Street, Chicago
Telephone Randolph 6340
New York Philadelphia Boston Milwaukee Minneapolis

The statements herein made are not guaranteed but they are based upon reports and other information which we believe to be entirely reliable, and upon which we have acted in purchasing these securities for our own account.

OHIO ELECTRIC POWER COMPANY

New York City, N. Y., August 24, 1925.

Messrs. A. C. Allyn and Company, Chicago.

Gentlemen:

In connection with your purchase of Ohio Electric Power Company First Mortgage Gold Bonds, Series "A" 6½% Sinking Fund, I am pleased to submit the following information:

BUSINESS AND TERRITORY

The Ohio Electric Power Company supplies without competition electric light, power and gas in the City of Oberlin and electric light and power in the towns of Ravenna and Mantua, and in other territory adjacent to Ravenna, Ohio. The Company also serves both at wholesale and retail, electric consumers in an extensive territory in Mercer, Auglaize, Shelby and Darke Counties, Ohio, and also conducts a portion of the retail electric light and power business in the City of Norwalk, Ohio.

The territory served by the Company includes important agricultural and industrial districts located in the north central and west central portions of Ohio. At Oberlin is located the well-known Oberlin College, having an enrollment of approximately 1,000 students. Oberlin is also the center of a prosperous agricultural district, and is served by the New York Central and Lorain, Ashland & Southern Railroads and the Cleveland Southwestern Railway & Light Company. Ravenna is the County Seat of Portage County, and is important from an industrial and manufacturing standpoint, being served by the Pennsylvania, Baltimore & Ohio and Erie Railroads, and also by an electric interurban railway. Other communities served by the Company include Saint Mary's, New Bremen, Minster, Fort Recovery and Norwalk.

CAPITALIZATION
(Funded Debt and Stock Issued)

First Firstgage Gold Bonds, Series "A"	
6½% Sinking Fund (this issue)	$949,000
7% Cumulative Preferred Stock	239,700
Common Stock (no par value)	2,000 shares

SECURITY

The First Mortgage Gold Bonds are a direct obligation of the Ohio Electric Power Company and are secured by a direct first mortgage upon the entire fixed property of the Company.

VALUATION

The value of the property owned by the Company, as determined by independent public utility engineers and appraisers, is largely in excess of the total outstanding funded debt of the Company.

EARNINGS

The consolidated earnings of the properties now owned by the Ohio Electric Power Company, for the twelve months ended April 30, 1925, were as follows:

Gross Earnings	$380,886
Operating Expenses and Taxes (Including Current Maintenance and Taxes other than Federal Income Taxes)	272,310
Net Earnings	$108,576
Annual Interest on $949,000 First Mortgage 6½% Bonds (this issue)	61,685

SINKING FUND

On July 1, 1925, and on each July 1 thereafter to and including July 1, 1929, the Company covenants to pay to the Trustee as a Sinking Fund for the Series "A" Bonds, an amount equivalent to 1% of the greatest principal amount of the Series "A" Bonds outstanding at any time during the preceding twelve months; and on July 1, 1930, and on each July 1 thereafter to and including July 1, 1934, an amount equivalent to 1½% of such principal amount of Series "A" Bonds; and on July 1, 1935, and on each July 1 thereafter to and including July 1, 1939, an amount equivalent to 2% of such principal amount of Series "A" Bonds; and on July 1, 1940, and on each July 1 thereafter to maturity an amount equivalent to 2½% of such principal amount of Series "A" Bonds.

All monies in the Sinking Fund are to be used exclusively for the purchase or redemption of bonds of Series "A" at or below their redemption price, and all bonds so acquired are to be cancelled.

PROPERTY

The major portion of the Company's power requirements is purchased from the Ohio Public Service Company for the Oberlin division, from the Northern Ohio Traction & Light Company for the Ravenna division, and from the Western Ohio Railway Company at Saint Mary's, at rates fixed in accordance with the practice of the Ohio Public Utilities Commission. In addition, the Company owns reserve electric generating stations at Oberlin, Ravenna and Norwalk.

The electric distribution system owned by the Company consists of the necessary poles, wires, transformers

and equipment adequate to serve its electric customers, as well as the street lighting systems in Oberlin and Ravenna. The power purchased from the Northern Ohio Traction & Light Company is transmitted over a 22,000-volt high-tension line owned by the Company, from Brady's Lake to Ravenna, three and one-half miles, where it is transformed for domestic lighting and power uses. The Company also owns the 13,200-volt transmission line from Ravenna to Mantua, a distance of approximately eight and one-half miles, and the 22,000-volt transmission line from Elyria through Oberlin to Norwalk, a distance of 34 miles. The transmission system in Mercer, Auglaize, Shelby and Darke Counties comprises 66 miles of transmission lines, most of which are designed and constructed for 33,000-volt operation, although temporarily operated at reduced voltage. Gas distributing mains at Oberlin, aggregating about 79,000 feet in length, are also owned by the Company.

GROWTH OF BUSINESS

The growth of the Company's business since 1919 of the properties now owned by the Company, is shown by the following table:

Year	Number of Customers	Kw-hr. Sold	Gross Revenue
1919	3,145	1,927,024	$180,003
1920	3,545	2,485,231	272,146
1921	3,932	2,915,824	284,650
1922	4,136	3,364,391	294,961
1923	4,418	3,646,908	318,322
1924	4,723	3,791,082	318,917
1925 year to Apr. 30)	6,475	4,852,999	380,886

In this six and one-third year period, the number of customers has increased 106%; Kw-hr. sold have increased 152%; and the gross revenues of the Company have increased 112%.

The above figures for 1925 give effect to the recent acquisition of additional properties, which serve about 1,160 electric customers.

MORTGAGE RESTRICTIONS

Additional First Mortgage Gold Bonds may be issued from time to time to a principal amount not exceeding 80% of the cost or fair value (whichever is less) of additional properties and/or permanent additions, im-

provements or acquisitions (as defined in the mortgage) made or acquired subsequent to July 1, 1924, less the total principal amount of prior liens (as defined in the mortgage) outstanding thereon, if any, provided earnings applicable to bond interest (as defined in the mortgage) for twelve consecutive calendar months within the fifteen calendar months immediately preceding the date of application for issuance of bonds, shall have been not less than twice the annual interest charges on all First Mortgage Gold Bonds outstanding, including those proposed to be issued (and on outstanding prior liens, if any, as defined in the mortgage); or additional bonds may be issued to a principal amount not exceeding 75% of the cost or fair value (whichever is less) of any such property if such net earnings shall have been not less than 1¾ times such interest charges.

First Mortgage Gold Bonds may also be issued against the deposit with the Trustee of an equal principal amount of cash, and such cash may be withdrawn in the manner and to the extent that bonds may be issued under this mortgage. First Mortgage Gold Bonds may also be issued to refund equal par amounts of the same or other series of bonds issued under this mortgage and prior liens (as defined in the mortgage), if any, on after acquired property.

First Mortgage Gold Bonds may be issued from time to time in series with such provisions as may be determined by the Board of Directors, subject to the restrictions of the mortgage. The bonds of additional series may bear such dates, rates of interest, mature at such times and carry such redemption, sinking fund, tax refund provisions; and such other varying or distinguishing provisions as may be determined by the Board of Directors, subject to the restrictions of the mortgage, but, except as to sinking funds which may be established for the exclusive benefit of a particular series, all bonds of all series shall be equally and ratably secured by the mortgage.

FRANCHISES

The franchises under which the Company operates are satisfactory in form and without burdensome restrictions. The Company's properties are operated under the jurisdiction of the Public Utilities Commission of Ohio, and the issuance of these bonds has been authorized by the Commission.

MANAGEMENT

The general operation of these properties will continue under the supervision of public utility operators whose successful and efficient management of important public utility companies has been demonstrated over a long period of years.

Yours very truly,
(Signed) Victor Emanuel,
Vice President.

PLAINTIFF'S EXHIBIT No. 79

New Issue

OHIO ELECTRIC POWER COMPANY
First Mortgage Gold Bonds
Series "B" 6% Sinking Fund

Dated January 1, 1926 Due January 1, 1946

Interest payable January 1 and July 1. Coupon bonds in interchangeable denominations of $1,000, $500 and $100. Only $1,000 bonds registerable as to principal. Redeemable at the option of the Company in whole or in part on any interest date on thirty days' notice to and including January 1, 1927, at 105 and accrued interest; this premium of 5% of the principal decreasing at the rate of ¼ of 1% of the principal on each January 2 thereafter. Interest payable at the option of the holder in New York or Chicago. Principal payable at the office of The Seaboard National Bank of The City of New York, Trustee.

Interest Payable Without Deduction for Normal Federal Income Tax Not to Exceed 2%

Pennsylvania Four-Mill Tax and Massachusetts Six Per Cent Income Tax refundable to holders resident in those states, as provided in the mortgage.

The Issuance of These Bonds Has Been Authorized by The Ohio Public Utilities Commission

The following information is summarized by Mr. Victor Emanuel, Vice-President, from his accompanying letter and from auditors' and appraisers' reports and other reliable sources:

Business: The Company supplies electric light and power in Oberlin, Ravenna, Sidney, Mantua, DeGraff and in an extensive territory in Mercer, Auglaize, Shelby and Darke Counties, Ohio—the total number of communities served being 45. Gas is also furnished at retail in the city of Oberlin. A subsidiary also furnishes, without competition, electric light and power in Union City, Indiana. The territories served by the Company include important agricultural and industrial districts in the north-central and west-central portions of Ohio. The aggregate population of the territories served is estimated at 70,000, and the total number of customers served is in excess of 12,500.

Security: The First Mortgage Gold Bonds are a direct obligation of the Company and are secured by direct first mortgage on its entire fixed property, subject only to $352,000 of Divisional Underlying 6% bonds now outstanding on part of the property only. Based on recent appraisals by independent public utility engineers and appraisers, the value of the properties of the Company is largely in excess of the total funded debt to be presently outstanding.

Earnings: For the twelve months ended June 30, 1926, the consolidated earnings of the Ohio Electric Power Company and its subsidiary were as follows:

Gross Earnings	$922,367
Operating Expenses and Taxes (including current maintenance and taxes other than Federal Income Taxes)	671,113
Net Earnings	$251,254
Annual Interest Charges on Total Funded Debt (including this issue)	126,971

The net earnings, as shown above, are thus practically twice such annual interest charges.

Sinking Fund: The Company covenants to pay to the Trustee as a Sinking Fund for the Series "B" bonds on July 1, 1927, and on each July 1 thereafter to and including July 1, 1945, an amount equivalent to 1% of the greatest principal amount of the Series "B" bonds outstanding at any time during the twelve months preceding the respective payments. All moneys in such

Sinking Fund are to be used for the purchase or redemption of Series "B" bonds at or below their current redemption price and accrued interest, and all bonds so acquired are to be cancelled.

Management: All of the outstanding Common Stock of Ohio Electric Power Company, except Directors' qualifying shares, is owned, either directly or indirectly through one of its subsidiaries, by National Electric Power Company. The local management of the business is in the hands of the men who have been responsible for the successful development of these properties, while its general operation is under the supervision of public utility operators whose successful and efficient management of important public utility companies has been demonstrated over a long period of years.

All legal details in connection with this issue will be passed upon and approved by Messrs. Pam & Hurd, Chicago, for the Bankers, and Messrs. Seibert & Riggs, New York, for the Company. The principal properties have been reported upon by Day & Zimmermann, Inc., Engineers, Philadelphia. The books and accounts of the Company are audited annually by Messrs. Arthur Young & Co., New York.

These bonds are offered for delivery when, as and if issued and accepted by us and subject to approval of our counsel. Definite bonds are ready for delivery.

Price on Application

A. C. ALLYN AND COMPANY
Established 1912
Investment Securities
67 West Monroe Street, Chicago
Telephone Randolph 6340
Milwaukee · Philadelphia San Francisco Minneapolis
New York Boston

The statements herein made are not guaranteed, but they are based upon reports and other information which we believe to be entirely reliable, and upon which we have acted in purchasing these securities for our own account.

OHIO ELECTRIC POWER COMPANY

New York, August 26, 1926

Messrs. A. C. Allyn and Company, Inc.
Gentlemen:

In connection with the issuance of Ohio Electric Power Company First Mortgage Gold Bonds, Series

"B," 6% Sinking Fund, I am pleased to submit the following information:

BUSINESS AND TERRITORY

The Ohio Electric Power Company supplies electric light and power in the cities of Oberlin, Ravenna, Sidney, Mautua, Atwater, St. Mary's, Norwalk, DeGraff and in an extensive territory in Mercer, Auglaize, Shelby and Darke Counties, Ohio—the total number of communities served being 45. Gas is furnished at retail in the city of Oberlin. The Company also owns all of the outstanding Common Stock, except Directors' qualifying shares, of the Union City Electric Company, supplying electric light and power in Union City, Indiana.

The territories served by the Company include important agricultural and industrial districts in the north-central and west-central portions of Ohio. Sidney is located in the prosperous Miami River Valley and is the home of the Wagner Manufacturing Company, one of the largest manufacturers of aluminum-ware in the United States. There are also located in Sidney large manufacturing establishments whose products include bread-making machinery, automobile bodies, washing-machines, road-building machinery and tools. At Oberlin is located the well-known Oberlin College, having an enrollment of approximately 1,000 students. Ravenna is the County Seat of Portage County and is an important industrial and manufacturing center. Union City, in addition to being the center of a thriving agricultural community, is also an important industrial center, being the home of two large automobile body manufacturing establishments.

These territories are particularly well supplied with railway transportation, being served by the New York Central, Pennsylvania, Baltimore & Ohio and Erie Railroads, as well as by a number of smaller railway and interurban lines. The territories have an aggregate population estimated to exceed 70,000, and the total number of customers is in excess of 12,500.

CAPITALIZATION
(To Be Outstanding Upon Completion of Present Financing)

First Mortgage Gold Bonds, Series "A"	
6½% Sinking Fund	$949,000
First Mortgage Gold Bonds, Series "B"	
6% Sinking Fund (this issue)	647,000

Divisional Underlying 6% Bonds..... 352,000
Seven Per Cent Cumulative Preferred Stock 464,500
Common Stock (No Par Value)..... 20,000 shares

In addition, there are outstanding $89,100 principal amount of 6% Bonds of its subsidiary.

SECURITY

The First Mortgage bonds are a direct obligation of the Company and are secured by direct First Mortgage upon its entire fixed property, subject only to $352,000 Divisional Underlying 6% Bonds outstanding on part of the property only.

VALUATION

Based on recent appraisals by independent public utility engineers and appraisers, the value of the fixed property of the Company is largely in excess of its total funded debt to be presently outstanding.

EARNINGS

For the twelve months ended June 30, 1926, the consolidated earnings of the Ohio Electric Power Company and its subsidiary were as follows:

Gross Earnings $922,367
Operating Expenses and Taxes (including current maintenance and taxes other than Federal Income Taxes)..... 671,113
Net Earnings $251,254
Annual Interest Charges on Total Funded Debt (including this issue)..... 126,971

The Net Earnings, as shown above, are thus practically twice such annual interest charges.

SINKING FUND

The Company covenants to pay to the Trustee as a Sinking Fund for the Series "B" bonds on July 1, 1927, and on each July 1 thereafter to and including July 1, 1945, an amount equivalent to 1% of the greatest principal amount of the Series "B" bonds outstanding at any time during the twelve months preceding the respective payments. All moneys in such Sinking Fund are to be used for the purchase or redemption of Series "B"

bonds at or below their current redemption price and accrued interest, and all bonds so acquired are to be cancelled.

PROPERTY

The major portion of the Company's power requirements for the Oberlin Division are purchased at favorable rates from the Ohio Public Service Company, for the Ravenna Division from the Northern Ohio Power & Light Company, for the Sidney Division from the Dayton Power & Light Company, and for its subsidiary, the Union City Electric Company, from the Greenville (Ohio) Light & Power Company. In addition the Company owns reserve electric generating stations at Oberlin, Ravenna, Sidney and Norwalk.

The electric distribution systems owned by the Company and its subsidiary consist of the necessary poles, wires, transformers and equipment adequate to serve efficiently its electric customers. Street lighting systems in each of the principal cities served, except Norwalk, are owned by the Company. High tension transmission lines owned by the Company extend from Brady's Lake to Ravenna, Mantua to Ravenna and from Elyria, through Oberlin, to Norwalk, and there are in addition 66 miles of high tension transmission lines located in Mercer, Auglaize, Shelby and Darke Counties. The aggregate length of these lines is in excess of 191 miles. At Oberlin, the Company owns approximately 79,000 feet of gas distributing mains, serving 1,218 customers.

GROWTH OF BUSINESS

The growth of business since 1921 of the properties of the Company and its subsidiary is shown by the following table:

Year	Number of Gas and Electric Customers	Kw. Hrs. Sold	Gross Revenue
1921	9,384	9,298,158	$626,384
1922	9,913	10,813,800	679,540
1923	10,548	11,599,824	737,027
1924	11,231	11,918,720	772,391
1925	12,117	13,098,020	854,142
1926—12 months ended June 20	12,533	14,219,651	922,367

In this five and one-half-year period, the number of customers has increased 34%, kw. hrs. sold have increased 53%, and gross revenues have increased 47%.

MORTGAGE RESTRICTIONS

Additional First Mortgage Bonds may be issued from time to time to a principal amount not exceeding 80% of the cost or fair value (whichever is less) of additional properties and/or permanent additions, improvements or acquisitions (as defined in the mortgage) made or acquired subsequent to July 1, 1924, less the total principal amount of prior liens (as defined in the mortgage) outstanding theron, if any, provided earnings applicable to bond interest (as defined in the mortgage) for twelve consecutive calendar months within the fifteen calendar months immediately preceding the date of application for issuance of bonds, shall have been not less than twice the annual interest charges on all First Mortgage Bonds outstanding, including those proposed to be issued (and on outstanding prior liens, if any, as defined in the mortgage); or additional bonds may be issued to a principal amount not exceeding 75% of the cost or fair value (whichever is less) of any such property if such net earnings shall have been not less than 1¾ times such interest charges.

First Mortgage Bonds may also be issued against the deposit with the Trustee of an equal principal amount of cash, and such cash may be withdrawn only in the manner and to the extent that bonds may be issued under this mortgage. First Mortgage Bonds may also be issued to refund equal par amounts of the same or other series of bonds issued under this mortgage and prior liens (as defined in the mortgage), if any, on after acquired property.

First Mortgage Bonds may be issued from time to time in series with such provisions as may be determined by the Board of Directors, subject to the restrictions of the mortgage. The bonds of additional series may bear such dates, rates of interest, mature at such times and carry such redemption, sinking fund, tax refund provisions, and such other varying or distinguishing provisions as may be determined by the Board of Directors, subject to the restrictions of the mortgage, but, except as to sinking funds which may be established for the exclusive benefit of a particular series, all bonds of all series shall be equally and ratably secured by the mortgage.

FRANCHISES

The franchises under which the Company operates are satisfactory in form and without burdensome restric-

tions. The Company's properties in Ohio are operated under the jurisdiction of the Ohio Public Utilities Commission and the issuance of these bonds is subject to the authorization of the Commission.

MANAGEMENT

All of the outstanding Common Stock of Ohio Electric Power Company, except Directors' qualifying shares, is owned, either directly or indirectly through one of its subsidiaries, by National Electric Power Company. The local management of the business is in the hands of the men who have been responsible for the successful development of these properties, while its general operation is under the supervision of public utility operators whose successful and efficient management of important public utility companies has been demonstrated over a long period of years.

Very truly yours,
Victor Emanuel,
Vice President.

PLAINTIFF'S EXHIBIT No. 80

Norwalk-Reflector Herald, Saturday, Nov. 21, 1914. Column 1, Page 1; Columns 3, 4, 5 and 6, Page 3.

GREEN LINE IS GIVEN HEARING BUT NO ENCOURAGEMENT

Hundred Citizens Turned Out to Hear Discussion of Latest Proposition

That the citizens of Norwalk in an overwhelming majority are firm in their decision to have a municipal lighting plant was indicated last evening, at a meeting held in the assembly room of the fire department head-

quarters arranged by the officials of the C. S. and C. Ry. Company.

The meeting was arranged that President F. E. Meyers and Vice-President J. L. Wolfe, of the Railway Company, might address the citizens relative to their proposition to come back on probation. The meeting was arranged by representatives of the company and was the last stand, with the possible exception of a suit attacking the validity of the bond issue, which was intimated by the officials of the company might follow.

Mr. Meyers and Mr. Wolfe both admitted that Norwalk had not been treated fairly by the company, but added, during their official connection with the road money was needed in other directions for the rebuilding of the railroad property more than in Norwalk, in their judgment. They preferred not to talk of the past but to look to the future. Residents of Norwalk, however, could not take their minds off the past and were strongly impressed with the old saying that the only way to judge the future is by the past.

When the meeting was called to order by Mayor Martin every chair in the room was taken and the end of the room near the entrance was crowded to the front of the building.

Mayor Martin presided when J. R. McKnight, President of the Chamber of Commerce, declined that post. The Mayor stated the object of the meeting adding that the City Council declared itself in favor of proceeding with the erection of a municipal plant. Mr. Meyers, he said, had expressed a desire, with other officials of the company, to address the council and citizens of Norwalk on the company's latest proposition.

After stating that it was an open meeting with everybody free to enter the discussing of the subject, he called upon C. H. Gallup, a friend of Mr. Meyers, to introduce that gentleman.

Mr. Gallup gave the President of the railway company, who is a resident and very wealthy resident of Ashland, O., a most complimentary introduction, saying that what he had to say would come from an honest heart and whatever promises he would make would be fulfilled. Mr. Gallup stated that he believed the railway company sincere in its proposition and that he knew Mr. Meyers to be an honest man.

President Meyers' Talk

After thanking Mr. C. H. Gallup for such a complimentary introduction, Mr. Meyers said he was more or less disturbed to know what the people of Norwalk are

willing to receive from an official of the Railway Company. He said he knew he was carrying the odium of being President of The C. S. and C. Company and that the Company was considerably embarrassed by the large vote in favor of the Municipal ownership.

"We know we are guilty of acts of omission," he said, "and are willing to start reproved. Our object in coming here, however, is in having you know we are sincere in our proposition to rebuild our plant along your lines and operate it on a year's trial at about one-half the cost of the present system. We have reached the point where we are willing to tell you what we can do, if you will believe in us.

"I am not going to cast any odium on my predecessors in the company, but I can assure you that when I came to the company I assumed a great deal. If it had not been for the pump factory, we would not have a railway free of embarrassment.

"We have all of us as business men encountered hard problems. I did not know all that was to be encountered or I would not be here now. My highest ambition was to improve the road bed enabling us to secure a patronage that would insure a satisfactory business. It took all the money we could get and we are today carrying an odium for paying for improvements and equipment instead of paying dividends.

"We chose to improve the property and carry the odium in the hope that the dividends would come later on. While that was going on the matter of light and power was not looked after as it should have been.

"I can frankly say I can understand why some of you feel as you do. I don't know what I can say except that we propose to redeem ourselves, if you will give us a chance. If it were not for the investment we have in your City, we could not think of making the proposition we have. We could not and would not think of making such a proposition in a new deal.

"In our discussion of this matter this evening, we do not care to deal with the past, but to talk of the future."

In response to the question of how long he had been President of the Company asked when he had finished, Mr. Meyers replied that it was about four or five years, adding, "Long enough to know that it is the hardest proposition I ever had to make money out of."

Mr. Wolfe's Talk

The next speaker was Mr. Wolfe, a Cleveland banker and financier, he is Vice-President of the Com-

pany. He stated at the outset of his talk that the Company had undertaken to do something in this instance that is a novel proposition. He declared the company's proposition to be more advantageous than any ever offered by a power company to a municipality of which he has any knowledge.

The Company is only able to do this, he declared, by reason of its investment in this city. Rather than have the investment destroyed, the Company has made some sacrifices, he declared.

"Rather than incur a heavy loss we have made a proposition to deliver power on rates that are unprecedented," declared Mr. Wolfe. "These rates, I am confident, are lower than the City of Norwalk can produce power for by running its own plant. This arises from several causes, such as larger units of manufacture, and diversity of load. At the rate offered, if maintenance and depreciation on municipal plants are taken into consideration, the rate offered by the company is much cheaper than it can be produced in Norwalk."

Mr. Wolfe then outlined the company's proposition, which he declared would save the city $4000.00 during the trial year. The proposition he said includes a reduction in commercial power and residence lighting. Then followed a long line of promises of what the company would do if given a year's time to show what kind of service it could give to the City of Norwalk without binding the City to anything except to take off the company's hands, if it then desired to go on with a municipal plant, the improvements made during the year under the direction of the city's engineer.

"It is feasible to give Norwalk good service," declared Mr. Wolfe. "We are not claiming to have had it, but there were reasons why the company was prevented from doing so. We might have done this instead of doing other things and if we had, the company might have been in the hands of receivers. Instead of a tottering property it is now on its feet. We have financial problems to meet but we have nursed our resources and feel that we are now on a safe basis.

"We are now prepared, if given the opportunity, to make some investments in Norwalk without taking the money from other propositions that needed attention.

"We know we are in good operating condition, able to keep the road up and still give attention to Norwalk. We believe most of you men here would do as we have done."

The Other Side

J. R. McKnight was the first citizen to speak. He said he was satisfied from the talks of both men that they were good servants, acting in the best interests of their stockholders and the public.

"As citizens of Norwalk we are now up to a point where we must decide whether or not we shall be good servants of the people of this city," said Mr. McKnight. "What has been said as to price may be true and I shall not argue that. The question for us to consider is what will be of the greatest ultimate value to the city."

The speaker said the business men of Norwalk have not for some time been working together as they ought. A feeling of distrust has been in the minds of many. He said the declaration of the people of the city for a municipal plant was a getting together of the forces of the city that should not be quickly set aside.

"It is not a question of saving $3,000.00 or $4,000.00 this year," said the speaker, "but a question of having a harmonious citizenship to cope with other propositions, which would be worth infinitely more. We should be in a position to protect ourselves the same as these gentlemen have done with their company. With the utmost kindness to these gentlemen I say I believe they are good servants. Ought not we to be good servants to our people? The council ought to have our support. We don't want to get into a quarrel with ourselves. We should be in a position to protect ourselves."

G. F. Titus former vice-mayor was the next speaker. He said there was not a month in the past nine years when the service of the company has been satisfactory. He thought it rather late in the day for the company to ask for a chance to furnish good service now.

The speaker cited the fact that officials of the company were invited to attend a meeting of the Chamber of Commerce as long ago as last February, when the light matter was up for discussion. Again a few nights before the bond election, at a meeting of citizens, they were asked to be present, but at neither of these meetings did anyone representing the company show up.

Mr. Titus then exhibited a circular, signed "Taxpayer," distributed the night before the election on which was a list of 200 towns purporting to be operating municipal plants, which, the circular declared, were failures. Having investigated the circular, corresponding with the officials of many of the cities, Mr. Titus declared that instead of 200 failures the sheet represented 200 lies.

Mr. Titus said not one of the company's propositions had been signed by a competent official of the company. All propositions, he declared, have been for delay so that that time would be too short in which to erect a municipal plant and the city be compelled to accept the company's proposition.

"I believe there are more hooks in the bait this company has thrown out than there bones in a shad," said the speaker. "I believe if we enter into a contract with this company, we will be without light for the next eleven years as we have been for the past nine years.

"I believe I voice the sentiment of a great majority of the people of the city when I ask that we be allowed to proceed with the erection of our municipal plant. I suggest, for one, that this discussion be cut out. We have decided in favor of a municipal light plant. We want it and we are going to have it."

Mr. Titus closing remarks were greeted with a round of hearty applause. Mr. Wolfe took exceptions to some of Mr. Titus' remarks, that the propositions of the company were not signed by responsible representatives, or that it was as full of snags as a shad is of bones.

G. S. Stewart inquired what would happen to the city, if, at the end of the trial year the city did not wish to continue relations with the company. Mr. Wolfe stated that the company would continue the operation of the plant until such time as the city should have its own plant in operation, and under guaranteed rates.

Mr. Wolfe again took occasion to combat the arguments of Mr. Titus, saying the company had not come to Norwalk with anything up their sleeves, or that there is anything mysterious about the manufacture of electrictiy, or in a contract between a corporation and a municipality.

George Parker, who was a director of public service when the present contract was first put into operation with the city, said he had no confidence in the company and never would have. He told of the suit the company instituted to get its first year's pay under the contract, and the settlement made allowing the city several thousand dollars.

"I move that the council be instructed to proceed with the construction of the municipal plant," interposed Mr. Titus at this time. The suggestion was greeted with a score of seconds.

George S. Stewart then spoke again, analyzing the matter as a purely business proposition. He agreed that the proposition was not just what he thought it was,

but offered some suggestions, which were accepted by Mr. Wolfe and Mr. Meyers, these being that a contract be entered into for ten years with privilege that the city, at any twelve months period might abrogate, making over the plant at its appraised value. Mr. Stewart was of the opinion the good business sense ought to prevail over hasty action in the erection of a municipal plant, especially as the company is offering a good proposition. He thought the city could easily safeguard itself in a contract with the company.

J. M. Harkness declared the company has not given what they were paid for in the way of service, and he had not heard of the company's giving anything back for the nine years; they admit poor service, and furthermore they don't intend to give anything back unless they can get a new contract, he said.

Mayor Martin being asked for remarks, stated that the council at its last meeting decided to go on with the plant, and that in this they will have the support of the administration to the end that the people be given the best plant possible.

Attorney G. Ray Craig was the next speaker. He said he was heartily in favor of the plant, more so now than ever before, since the people had declared in favor of it by a ten to one vote. He said he was wondering why the company submitted its proposition now and not prior to the bond election, and why this change of heart.

Mr. Craig said he was opposed to entering into a tentative contract. That past experience was not such as to inspire confidence in the promises the company has made. He said he knew something of the litigation at the outset of the contract and that there is no doubt that the company "buncoed" the city in the deal. He said it is an undisputed fact that the company installed a plant in this city nine years ago with lamps that had been discarded in manufacture five years previous and put in a system of lighting not contemplated when the contract was made. Mr. Craig then raised one of the most interesting questions of the discussion. He addressed himself to Mr. Wolfe and asked him whether or not it was true that the company had up its sleeve a petition to be filed in court attacking the validity of the bonds and to stop its issue.

To this Mr. Wolfe replied that McGinn, the company's attorney, expressed the belief that the bond issue was illegal and that as an attorney he was in favor of instituting proceedings that would demonstrate the illegality of the bonds.

"Mr. Meyers and myself," declared the speaker, "prevailed upon him not to do this. What the entire board of directors, numbering seventeen, may finally desire to do in this regard I am not in a position to say."

Mr. Craig expressed the opinion that it came with poor grace for a company asking favors of a city to attempt, if defeated in its negotiations to attempt to slander the bonds of the municipality.

By this time the hour of ten o'clock had been reached and the crowd was growing impatient. There were frequent cries of "question" and finally Mayor Martin put the proposition made by Mr. Titus, some time previous, that the council be instructed to proceed with the construction of the municipal plant, to a vote.

There was an uproarious "Aye." No one raised his vote in the negative.

PLAINTIFF'S EXHIBIT No. 81

CLEVELAND SOUTHWESTERN AND COLUMBUS RAILWAY COMPANY
Cleveland, Ohio

F. E. Myers, Pres.
F. H. Ginn, V. Pres.
L. J. Wolf, 2nd V. Pres.
J. O. Wilson, Sec. & Treas.
E. F. Schneider, Gen. Mgr.
H. B. Cavanaugh, Auditor.

October 12, 1914.

To the Mayor and City Council
of the City of Norwalk, Ohio.

Gentlemen:

We are so confident of our ability to give to the City of Norwalk uninterrupted, regular and satisfactory service that we are willing to make a demonstration to the city at considerable initial expenditure to ourselves and without any obligation upon the City other than herein expressed.

We know that the rates proposed herein, and heretofore submitted to you, will save the City of Norwalk itself a considerable sum, and that the rates proposed for residence and commercial lighting will save a large sum to the residents of Norwalk.

Our proposal will not in any way interfere with the erection and operation by the City of a municipal plant, if our test proves unsatisfactory to you and to the citizens of Norwalk, but if it proves successful and satisfactory, we will save for the city and the citizens not only a considerable sum in the price of current, but also the necessity of a large capital investment and the operation of a municipal plant.

Our proposal in brief is as follows:

(a) Southwestern Company to rebuild the transmission lines from Elyria to Norwalk so as to insure reliability of service.

(b) The Company to sell the city 25-cycle energy at 1¾ cents per KWH and 60-cycle energy at 2½ cents per KWH and when an aggregate of both kinds of electric energy of more than 700,000 KWH per year delivered to the city and the consumers of Norwalk, is attained, the price for 60-cycle to be reduced to 2¼ cents per KWH, said electric energy to be measured at the point of delivery to the City at the company power house at Norwalk, the company to install duplicate Master Meters at said point.

(c) The 25-cycle energy is in every way as useful and serviceable for street lighting as 60-cycle, but the city may, according to its desire take either 25-cycle or 60-cycle.

(d) The Company under the direction of the directors of public works of Norwalk or of the City Council to make the investment in such extensions of the distributing line and appurtenances in Norwalk desired by the City, including the "White Way" system.

(e) The company to install switches on the various circuits of street lamps so that the lamps may be cut on or off so as to control the hours of burning.

(f) The company to equip the present arc lines for the use of nitrogen tungsten instead of arc lights, the city to furnish the bulbs and renewals of bulbs.

(g) Residence and commercial lighting to be as per company's bid submitted last May.

(h) All of the above arrangements to run to the end of the present contract for street lighting, and if at the end of the present contract the city and the company cannot agree upon a renewal the city is then to take over

and pay for such of the extensions and equipment installed in Norwalk, above referred to, at cost to our company made under the directions of the public authorities of Norwalk and the company shall continue to operate upon the present proposed terms until the municipal plant is built and ready for operation, the city to be under no obligation to buy any portion of the present lines. The city, however, to have the option to purchase such portion of our present distributing lines, equipment, line transformers, meters, etc., constituting our present distribution system in the City, if the city may desire to purchase at prices to be then mutually agreed upon and if an agreement cannot be arrived at, prices to be determined by arbitration.

Very truly,

F. E. Myers, President of the Cleveland Southwestern and Columbus Railway Company.

PLAINTIFF'S EXHIBIT No. 82

OHIO ELECTRIC POWER COMPANY
Norwalk, Ohio.

October 27, 1926.

To Our Customers:

Due to the fact that there is now a controversy between the Ohio Electric Power Company and the City, over the right to continue to operate in the City of Norwalk, it is our desire to inform our customers that there are various reports regarding our continued operation of our electric property after the election on November 2d. If the ordinance to be voted on at that time establishing our rights here should be defeated we wish to inform you that no matter what the outcome of the election we shall continue to serve our customers. Do not be misled by false reports as these reports emanate from people who do not understand the issue and are entirely

misinformed. If our ordinance is defeated the matter will, of course, be fought out in the courts and it will be many months before a final decision is reached. A long period will elapse before you need worry about being without our service.

We adopted the plan of presenting this ordinance to the voters on election day for the reason that we want to avoid the expense, not only to ourselves, but to the taxpayers, of long drawn out litigation and in the end be just where we started. This is the quickest way to settle the matter without further expense to all concerned.

We are hoping, however, that our customers will avail themselves of this opportunity on election day, November 2d, to go to the polls and vote "yes" on our ordinance which will make secure the fair competition which will be carried on between the Ohio Electric Power Co. and the City; thus assuring good service and low rates.

In conclusion please do not forget to go to the polls and vote "yes" on election day.

Yours very truly,
Ohio Electric Power Co.
By D. E. Turkle, Manager.

PLAINTIFF'S EXHIBIT No. 83

C. L. Clune hereby certifies that he is an Assistant Trust Officer of The Chase National Bank of the City of New York; that the records of the former The Seaboard National Bank of the City of New York, trustee, and of the former The Equitable Trust Company of New York, successor trustee, with reference to a certain mortgage and deed of trust dated July 1, 1924, and executed and delivered by the Ohio Electric Power Company to said Seaboard National Bank on September 2, 1924, and with reference to the mortgages supplemental thereto, are now

in the possession and control of The Chase National Bank of the City of New York, as successor trustee under said mortgage and deed of trust and said supplemental mortgages; that annexed are an exact copy of the Engineer's Certificate and an exact copy of the Independent Engineer's Certificate which were furnished to the trustee in connection with the authentication and delivery on May 28, 1925, under said mortgage by the trustee of $100,000 in principal amount of bonds; and that the original of said Engineer's Certificate and the original of said Independent Engineer's Certificate are on file with the records of the trustee.

Dated November 18, 1930.

C. L. Clune,
Assistant Trust Officer.

ENGINEER'S CERTIFICATE
Required by the Provisions of Subdivision (2) of Section 6 of Article V of the Mortgage and Deed of Trust

To the Seaboard National Bank of the City of New York:

We, Leo Loeb, Vice-President of Ohio Electric Power Company, and A. E. Burns, an Engineer in the employ of the Ohio Electric Power Company, appointed by the Board of Directors of said Company, to make this certificate for the purpose of inducing you to authenticate and deliver the bonds mentioned in the foregoing application, dated May 25, 1925, do hereby certify that hereto annexed and marked "Schedule A," (which is hereby made a part hereof as if herein set forth at length), is a description in reasonable detail of the permanent additions proposed as a basis for the issuance of the bonds specified in the said application; that the properties described in said Schedule are permanent additions as defined in Section 4 of Article I. of the said Mortgage and Deed of Trust; that they are desirable for use in the profitable conduct of the Company's business, and they do not consist in whole or in part of properties which under the provisions of Section 2 of Article V. of said Mortgage and Deed of Trust, are not permitted to be made the basis of the authentication and delivery of bonds; that the cost of said permanent additions is $161,300, and the fair value of said permanent additions being of the character described in Subdivision (3) of Section 6 of Article V. of said Mortgage and Deed of Trust is stated in the accompanying independent engineer's certificate to be one hundred sixty-one thousand three hundred thirty-nine ($161,339) Dollars, that the

undersigned have actual knowledge of the cost of said permanent additions acquired from the books of the Company, contracts relating to the purchase and acquisition thereof and other records of the Company and information acquired in the performance of their duties.

That there are no prior liens as defined in Section 5 of Article I. of said Mortgage and Deed of Trust existing upon any of the permanent additions described in said Schedule A. That all of the permanent additions described in said Schedule A consist of property which has been used or operated by other than the Company in the public utility business, or has not been constructed by or for the Company. This certificate and the said Schedule A include all permanent additions subject at the date hereof and at the time of the acquisition thereof by the Company to a lien which is or may become a prior lien, and which have not previously been made the basis for the issuance of bonds or the withdrawal of cash under said Mortgage and Deed of Trust, and which have been constructed or acquired to May 25, 1925.

Of the permanent additions referred to in this certificate so much thereof as have cost $133,334 are to be used as a basis for the issuance of bonds applied for in the annexed request dated May 25, 1925, leaving a balance of permanent additions costing $27,966 and of the same fair value available for use as a basis for the issuance of addition bonds.

Dated, May 25, 1925.

Leo Loeb,
Alan E. Burns.

State of New York, County of New York, ss.:

We, Leo Loeb, and A. E. Burns, do severally depose and say that we have read the foregoing Certificate and the Schedule A therein mentioned and that the statements therein contained are true.

Leo Loeb
Alan E. Burns

Subscribed and sworn to before me this 25th day of May, 1925.

Mae B. Coy, Notary Public.
New York County Clerk's No. 383.
New York County Register's No. 7337.
Commission expires Mar. 30th, 1927.
(Notarial Seal)

SCHEDULE A

Description of properties formerly belonging to the Cleveland Southwestern Railway and Light Company to be acquired by the Ohio Electric Power Company and to be used in the business of producing, supplying and selling electricity.

These properties comprise:

(1) A parcel of real property at Norwalk, Ohio, being the location of the power plant; and a parcel of real estate in Florence Township, Ohio, to be used for a substation.

(2) A brick power plant building and equipment at Norwalk, Ohio, the principal item of equipment being a 160 K.W. generator belt driven by a tandem compound steam engine served with steam by one 300 H.P. boiler. Located at this plant are three 100 K.V.A. transformers of 22,000/2,300 volts rating.

(3) An electric distribution system in the City of Norwalk serving approximately 540 customers.

(4) Substation equipment at Oberlin and Birmingham.

(5) A transmission line approximately 34 miles long being 22,000 volts three phase, constructed of wooden poles with patented steel triangular cross arms supporting aluminum wire, from Norwalk, Ohio, to Elyria, Ohio.

(6) Miscellaneous tools and equipment.

The foregoing properties with the exception of the real property are described in a bill of sale from the Cleveland Southwestern Railway and Light Company as follows:

(a) That certain three phase high tension line, poles and equipment therefor between the power house and substation in the City of Norwalk of the Grantor and the point of intersection of the Elyria-Oberlin Road, and East Lorain Street in the Village of Oberlin extended, east of Oberlin.

(b) That certain three phase high tension line, poles and equipment therefor, extending from the high tension line hereinbefore described in Paragraph (a) hereof, to the Oberlin Water Works in the Village of Oberlin, together also with all sub-station equipment in connection therewith of the Grantor in the City of Oberlin, said equipment including all articles of personal property and all appurtenances in and to said high tension line mentioned in this paragraph.

(c) All primary and secondary light lines of the Grantor located on the poles referred to in Paragraphs

(a) and (b) hereof and/or used in connection with the power and light business of the Grantor, including (1) approximately 3.9 miles of line between the city limits of the City of Norwalk and Stop 35 upon the Electric Interurban Railroad of the Grantor and (2) Line from point of connection with said high tension line described in Paragraph (a) hereof to and in the Village of Kipton, Ohio, and including all distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto or used in connection therewith of the Grantor, within said Village of Kipton.

(d) All distribution power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the Grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines and poles of the Grantor, approximately 5.2 miles of lines on poles of others than the Grantor, and approximately 4.3 miles of lines on poles owned jointly by the Grantor and others, together with all right, title and interest of the Grantor in and to the poles so occupied jointly.

(e) All equipment, material, appurtenances of the Grantor in and to the Power House and Sub-station of the Grantor in the City of Norwalk, Ohio, including boilers, engines, frequency changer, transformers, oil switches, metering equipment, rotary coverter.

Also all switching equipment, transformers, appurtenances and other equipment in connection with said three phase high tension line mentioned in Paragraph (a) hereof and located in the Railroad Station of the Grantor in the Village of Birmingham, Ohio, and used in connection with the commercial power and light business of the Grantor.

(f) That certain three phase high tension wire, cross arms, pins and insulators between the point of intersection of the Elyria-Oberlin Road and East Lorain Street of the Village of Oberlin extended, east of Oberlin (referred to in Paragraph (a)) and the point on the right of way of the Electric Interurban Railway of the Grantor where the Polk High Tension Line of the Grantor so-called, intersects said railway right of way and the pole line in connection therewith at Stop 100 on said right of way; more commonly known as Wack's Cheese Factory.

(g) That certain three phase high tension wire, pins and insulators located on the north side of poles of the Grantor between said Stop 100 referred to in Paragraph (f) hereof and the west property line of the car shops of the Grantor in the City of Elyria, Ohio.

INDEPENDENT ENGINEERS' CERTIFICATE
Required by the Provisions of Subdivision (3) of Section 6 of Article V of the Mortgage and Deed of Trust

To The Seaboard National Bank of the City of New York:

The undersigned, Day & Zimmermann, Inc., Engineers appointed by you and approved by the Board of Directors of the Company to make this certificate for the purpose of inducing you to authenticate and deliver the bonds applied for in the accompanying application of Ohio Electric Power Company, dated May 25th, 1925, do hereby certify that Schedule A hereto annexed, which is hereby made a part hereof as if herein set forth at length, contains a description in reasonable detail of the properties proposed as a basis for the issuance of bonds specified in said application which, as stated in the foregoing certificate of Leo Loeb and Alan E. Burns, consists of property which has been used or operated by others than the Company in the public utility business or which has not been constructed by or for the Company, and that the fair value thereof, for the purposes of the Company, is one hundred sixty-one thousand three hundred thirty-nine ($161,339) Dollars.

We do hereby further certify that the considerations governing our determination of the fair value thereof are as follows:

We have made an investigation of said property consisting of an inspection thereof to determine its operating condition and have prepared an inventory of the various items of physical property and have made an estimate of the reproduction cost new and such cost less accrued depreciation as of December 20, 1924, which is as follows:

	Estimated Cost of Reproduction Average Prices 1919-1924	
	New	Less Accrued Depreciation
Land	$ 3,500	$ 3,500
Power Plant	78,610	32,000
Distribution System	54,798	52,000
Substation	4,475	4,030
Transmission Lines	91,402	81,500
Miscellaneous	1,320	1,085
	$234,105	$174,115

In addition to the above estimate of reproduction cost new and such cost less accrued depreciation, we find

that for the purpose of purchase and sale the Public Utilities Commission of Ohio recently found a value for said property in the amount of $161,339.

Based on the foregoing considerations it is our judgment and opinion that the present value of these properties for the purposes of the Ohio Electric Power Company is one hundred sixty-one thousand three hundred thirty-nine ($161,339) Dollars.

Dated, May 27th, 1925.

W. Findlay Downs,
Manager Investigations and
Reports Department.

State of New York, County of New York, ss.:

W. Findlay Downs, being duly sworn, deposes and says: That he is an Engineer of Day & Zimmermann, Inc., a corporation organized and existing under and by virtue of the laws of the State of Maryland, and engaged in the engineering business; that he has read the foregoing certificate and the schedule thereto attached and knows the contents thereof and that the statements therein contained are true.

W. Findlay Downs.

Sworn to before me this 27th day of May, 1925.

Mae B. Coy, Notary Public
(Seal) New York County Clerk's No. 383
New York County Register's No. 7337
Commission expires Mar. 30th, 1927

SCHEDULE A

(Same as Schedule A to Engineer's Certificate, supra.)

PLAINTIFF'S EXHIBIT No. 84

O.K. as to form—E. F. B., H. C. L.

City Council Chamber,
Norwalk, O., March 25, 1913.

Council met in adjourned session with President Holiday, Clerk Christian and the following members: Cole, Fifner, Haas, Heston, Linder, Smith, Spurrier.

C. G. Taylor, representing the Cleveland Southwestern & Columbus Railway Co., submitted the following lighting proposition to the council:

First. To change the residence lighting rate from 12c. per K.W. to 10c. for the first 10 K.W. and 5c. for all over 10 K.W. consumed per month Minimum charge of 50c.

Second. To change the commercial rate from 8c. per K.W. to 10c. for the first 10 K.W. and 5c. for all over 10 K.W. consumed per month. Minimum charge of 50c.

Third. To change the city lighting system from 100 arc lamps at $65 per lamp, per annum, to 30 five light posts at $50 per post per annum, and 150 Tungston lamps at $18 per lamp per annum.

In exchange for the above said company asks your honorable body for,

Fourth. An eight year extension of their present lighting contract.

After a somewhat lengthy discussion of the lighting proposition, on motion of Spurrier, seconded by Smith, council adjourned.

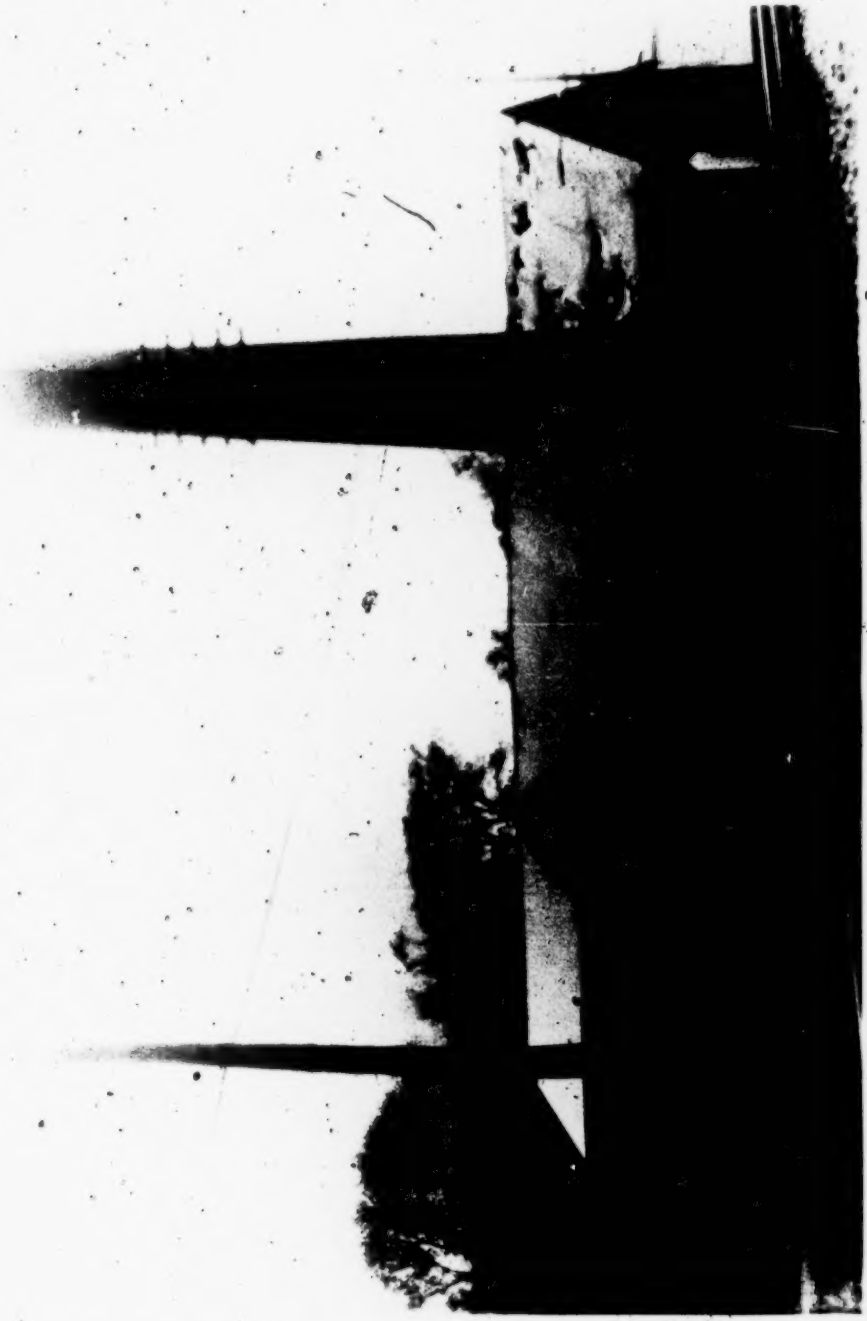
R. L. Christian,
Clerk.

A. C. Holiday,
President.

I, F. G. Warner, City Auditor and Clerk of Council of the City of Norwalk, Ohio, do hereby certify that the foregoing is a true and correct copy of the records of the Council of the City of Norwalk, the same being in my possession and under my control.

(Signed) F. G. Warner

DEFENDANT'S EXHIBIT A



DEFENDANT'S EXHIBIT B

O.K. as to form—H. C. L., E. F. B.

Initiative Petition to Submit to the Electors of the City of Norwalk the Ordinance Granting The Ohio Electric Power Co. a Franchise for Fifteen Years, to Be Voted on Nov. 2, 1926, and Result of Vote.

NOTICE

Whoever knowingly signs this petition more than once, signs a name other than his own, or signs when not a legal voter, is liable to prosecution.

To: F. G. Warner,
Auditor of the City of Norwalk, Ohio:

We, the undersigned electors of the City of Norwalk, County of Huron, Ohio, respectfully petition and propose that the following ordinance to-wit:

ORDINANCE

An Ordinance Granting to Ohio Electric Power Company the right to Erect, Maintain and Operate for the Period of Fifteen Years an Electric Lighting, Power and Heating System in the City of Norwalk, Ohio.

Be it ordained by the Council of the City of Norwalk, Ohio, as follows, to-wit:

Section 1. That the Ohio Electric Power Company (a corporation organized under the laws of the State of Ohio), its successors and assigns, is hereby granted the right to use the streets, alleys, and public places and grounds of said City for the purpose of thereon and therein erecitng, operating and maintaining a system of poles, wires, fixtures, and other necessary apparatus for transmitting electricity and electric current for lighting, power, heating and other purposes for public and private use.

Section 2. All excavations are to be properly guarded, and the City held free and harmless from any and all damages resulting from the constructing, operating and maintaining of said system.

Section 3. The City of Norwalk is hereby permitted the right to use the poles of said Company for stringing wires for fire or police service.

Section 4. The City of Norwalk hereby reserves to itself, and its successors, the granting of similar rights to any other company, corporation or person.

Section 5. All construction work hereafter performed by such Company and the operation hereafter of its property in the City of Norwalk, Ohio, shall be subject to all the terms and conditions of a certain ordinance passed by the Council of the City of Norwalk, on the first day of July, 1924, and being No..... entitled "An Ordinance to Regulate the Construction and Maintenance of Electric Light and Power Wires, Telephone, Signal and Trolley Wires."

Section 6. The Company shall in the exercise of its rights under this Ordinance at all times adopt such new devices or improvements discovered in the science of producing electricity as may work economies in its operations and reduce the cost of current to the consumer.

Section 7. This ordinance shall become binding as a contract upon the City of Norwalk and Ohio Electric Power Company in the event that the said Company shall, within thirty (30) days from the passage of this ordinance, file with the Clerk of said City its written acceptance of the same.

Section 8. This ordinance shall be in full force and effect from and after its approval by the electors of the City of Norwalk in the manner provided by law, its legal publication and acceptance by Ohio Electric Power Company and so continue in effect for and during a period of fifteen (15) years, subject to the conditions herein written.

shall be submitted and referred to the electors of the City of Norwalk for their approval or rejection at the next succeeding regular or general election occurring subsequent to forty (40) days after the filing of this petition; and each for himself, says, "I know the contents of, and have personally signed, this petition, and my residence is correctly stated opposite my name."

We hereby designate D. E. Turkle, E. B. Summers and J. S. Taber, of our number as the Committee to be regarded as filing this petition.

Date Name Residence Ward-Precinct

(Signatures—655 in number—omitted.)

Council proceedings of the City of Norwalk, Ohio, held at the Council Chamber, November 9, 1926:

"City Council Chamber,
Norwalk, Ohio, November 9, 1926.

City Council met this day in adjourned session from November 2, 1926.

Present: L. A. Heston, President of Council, and members Schwartz, Wilson, Burdue, Cole, Call and Fifner. Absent, Ernsthausen at home sick.

Minutes of previous meetings approved as read."

* * * * * *

"The City Auditor reported having caused a copy of initiative Ordinance, by the Ohio Electric Power Company, and sample ballot, to be distributed to every house in the City, as required by law.

The Auditor also certified the official count of ballots on Initiative Ordinance as canvassed by the Mayor and City Auditor. Total vote by precincts for the Ordinance 910, against the Ordinance 2172."

* * * * * *

"On motion of Schwartz, seconded by Fifner, Council adjourned.

.....Pres. of Council.
(Signed) F. G. Warner, Clerk."

City of Norwalk, Ohio
Department of Accounts
F. G. Warner, Auditor
November 9th, 1926.

To the Honorable Council
City of Norwalk, Ohio.
Gentlemen:

Herewith is the abstract of ballot on the Initiative Ordinance, voted on at General Election held November 2nd, 1926.

Copy of Ordinance and sample ballot hereto attached.

Ward 1	Precinct	A	Yes	70	No	156
"	"	B	"	103	"	187
"	"	C	"	78	"	198
Ward 2	"	A	"	48	"	213
"	"	B	"	65	"	183
"	"	C	"	52	"	185
Ward 3	"	A	"	71	"	157
"	"	B	"	37	"	134
"	"	C	"	58	"	216
Ward 4	"	A	"	75	"	173
"	"	B	"	152	"	159
"	"	C	"	101	"	211
				910		2172

Signed F. G. Warner, City Auditor.
Signed A. C. Smith, Mayor.

DEFENDANT'S EXHIBIT D

Norwalk, Ohio
Reproduction Cost New

Transmission Line	
25 miles of 22,000 volt, 3 phase, line, 35 foot poles, 300 ft. spans, #2 copper, nominal charge for right away @ $3,000 per mile.	$ 75,000.00
Substation	
3—100 K. V. A., 22000/2300 volt single phase transformers, lightning arresters, disconnects, fuses, wooden platform, fence,	
2—17¼ K. V. A. voltage regulators, bus bars, insulators, supports, installed.....	$ 5,540.00
Generating Station	
1—200 kilowatt engine generator unit with exciter, switchboard, boiler, stack, in brick building with slate roof.....	$ 48,650.00
Distribution	
453 customers each requiring on an average; 1 span of primary and secondary, 3 wires each; 1/5 of 5 K. V. A. transformer; 1—3 wire service; 1—10 ampere meter @ $66.71 each.....	$ 30,154.00
Miscellaneous	
1—1-ton Chevrolet, 1—Ford with slip on body, 1—Chevrolet roadster, Office equipment, tools, supplies.....	$ 4,800.00
Total reproduction cost new.....	$164,144.00

Present Value

Transmission Line		
65% of $75,000 (reproduction new).....		$ 48,750.00
Substation		
85% of $5,540 (reproduction new).....		$ 4,709.00
Generating Station		
Buildings		
45% of $17,150 (reproduction new).....	$ 7,717.00	
Land $1,500	$ 1,500.00	
Equipment		
60% $30,000 (reproduction new).....	$18,000.00	$ 27,217.00

Distribution

80% of $30,154 (reproduction new).....$ 24,123.00

Miscellaneous. .....$ 3,525.00

Total present value.....$108,324.00

Description of Property and Computations

Transmission Line

Extending from Oberlin Substation, Oberlin, Ohio, to the generating station at Norwalk, Ohio; length 25 miles; 22,000 volts; 3 phase; 60 cycles; #2 aluminum cable; 35,000 volt porcelain insulators; Keystone metal arms with exception of about 2 miles of wooden arms; 35 foot poles, about 50% of which are stubbed; major portion of the line on private right-of-way with short distances on steam railway right-of-way or highways; average spacing 125 feet.

Average unit cost per mile of new 22,000 volt transmission line, 35 foot poles, 300 foot spans, wood arms, #2 copper wire, on private right-of-way $3,000 per mile

Substation

3—100 K. V. A. transformers 22,000/2300 volts outdoor, General Electric Co.

3—Lightning arresters, multigap 22,000 volts

3—disconnect switches, 22,000 volts

3—fuses 22,000 volt

3—17¼ K. V. A. induction voltage regulators, General Electric Co., Type I. R. S.

Miscellaneous, Bus, insulators, supports, frame work, wooden platform and fence.

Transformers.	$2,298.00
Lightning arresters, fuses and disconnects	638.00
Voltage regulators	2,354.00
Misc. and labor of installation	250.00
Total	$5,540.00

Generating Station

Plot of ground sufficient for purposes of small generating station on siding of Wheeling and Lake Erie Railroad, together with right-of-way for egress and ingress across adjoining property.

Brick building with dividing wall 50 ft. wide, 100 ft. long, 16 ft. high to eaves, peaked frame slate covered roof, concrete floor; one addition 21 ft. x 6 ft. x 16 ft. high with flat roof and concrete floor.

1—tandem compound steam engine John T. Noye Mfg. Co.

1—belt driven generator, Allis Chalmers Mfg. Co., #102800, 2300 volts, 50 amperes, 3 phase, 60 cycles, 600 r.p.m.
1—belt driven exciter, Westinghouse Electric & Mfg. Co., #110 D Type S. K., 125 volts, 180 amperes, 1150 r.p.m., #2325793.
1—150 H.P. water tube Sterling boiler.
1—Brick stack 70 feet high.
1—Sheet iron breeching.
5—Switchboard panels for generator control; double throw switch from transmission line supply to generator or vice versa; 2—3 phase oil circuit breaker controls; and 1—1 phase circuit breaker control.

Buildings

50 x 100 x 16 and 21 x 6 x 16 @ 20 cents per cu. ft.	$16,400.00
Wiring.	750.00
Land.	1,500.00
Engine, generator, exciter, switchboard, boiler, stack installed 200 K.W. @ $150. per K. W.	30,000.00
Total	$48,650.00

Distribution, Primarry, Secondary, Transformers, Services and Meters

8.45 pole line miles of primary distribution scaled from distribution map. 2300 volts, 3 phase average #6 copper wire.
8.10 pole line miles of secondary distribution 3 wire, 110/220 volts average #8 copper wire.
13.11 pole line miles consolidated primary and secondary lines.
453 customers scattered over the city

Distribution for one customer

1 pole and span of primary and secondary 3 wire each, 125 foot span	$40.00
1/5 of 5 K. V. A. transformer	10.96
1—3 wire secondary	7.50
1—10 ampere meter	8.25
Average distribution investment per customer.	$66.71

Miscellaneous:

	New	Depreciated
1—1-ton Chevrolet truck	750.00	400.00
1—Ford slip on body	500.00	250.00
1—Chevrolet roadster	450.00	275.00

Tools	100.00	10[illegible]0
Office furniture and fixtures, bins, files, safe	2500.00	2000.00
Supplies on hand	500.00	500.00
Total miscellaneous	4800.00	3525.00

The present value of the property of the Ohio Electric Power Co. used and useful in the generating, supplying and distribution of electric energy to the inhabitants of Norwalk, Ohio, was derived in the following manner:

1. An inspection of the physical property was made to list the major items, to obtain a description of same, and to estimate for each the present actual value in per cent of the present day reproduction value.

2. The present reproduction value was derived by applying present day unit costs, such as cost per mile of transmission line, cost per K. W. of generating equipment, cost of distribution system per customer, etc., to the major items.

3. The present value of the physical property was then derived by applying the percentages, of present value to reproduction value, to the derived reproduction values for the different items.

Made inspection November 7, 1930.

Plant built in 1395.

Transmission Line built in 1905.

DEFENDANT'S EXHIBIT E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 1040

The Equitable Trust Company of New York,
Plaintiff,

vs.

City of Norwalk, Ohio,
Defendant.

STIPULATION

It is hereby stipulated and agreed by and between Counsel for plaintiff and defendant that the deposition of Mr. Clayton E. Tucker as the same appears in the printed Record of Proceedings in Quo Warranto in the Supreme Court of Ohio in the case of Ohio Electric Power Company vs. State of Ohio on the relation of Edgar G. Martin, Prosecuting Attorney of Huron County, State of Ohio, Number 21302, pages 48 to 52 inclusive, may be read by the defendant in this case as the testimony of Mr. Clayton E. Tucker in this case with the same effect and subject to the same objection as if Mr. Clayton E. Tucker took the stand in this case and testified under oath, and that the deposition of Mr. John R. Berry as the same appears in the same Record, pages 53 to 55, inclusive, may be read by the defendant in this case as the testimony of Mr. John R. Berry in this case with the same effect and subject to the same objection as if Mr. John R. Berry took the stand in this case and testified under oath, and it is further agreed and stipulated that certification by the Supreme Court of Ohio of the Record from which such deposition shall be read shall be unnecessary, but that plaintiff may check and correct any errors in the reading of such deposition by comparison with the printed copy of such Record in its possession.

Earl F. Boxell,
Counsel for Plaintiff.
W. A. Eversman,
Counsel for Defendant.

DEFENDANT'S EXHIBIT F

O.K. as to form—H. C. L., E. F. B.

Petition in Case of Cutter vs. The Incandescent Light & Power Co., Together With Interrogatories and Form of Contract.

In the Court of Common Pleas of Huron County, Ohio.

Civil Action.

George Cutter, Plaintiff,

vs.

The Incandescent Light and Power Company, of Norwalk, Ohio, Thomas Dunmore, William Huntington, Ed. D. Sawyer, Frank Link, Frederick Colson, Benjamin Niman, Arthur L. Osborn, Isaac W. Bostwick, ... Hester, Charles Suhr, Daniel H. Fox, Robert K. Rood, David C. King, Eugene Smith, William E. Gill, William E. Sidnall, David W. Vail, Delos O. Woodward, James R. Allan, and George Butt,

Defendants.

PETITION

(Filed March 8, 1893, R. K. Rood, Clerk.)

The said plaintiff for his cause of action against the said defendants says that the defendant The Incandescent Light and Power Company of Norwalk, Ohio, is a Corporation duly organized as such under the laws of Ohio and having its principal office and place of business at Norwalk, Ohio; that its capital stock is in the amount of twenty-five thousand dollars; that the other defendants named herein are subscribers to said capital stock and owners of shares therein but in what amounts respectively plaintiff does not know and cannot state; that plaintiff believes and therefore avers the fact to be, that divers other persons unknown to plaintiff are owners of shares of said stock; that the said defendant David W. Vail is the President and Charles Suhr the Secretary of said Corporation; that said Corporation is insolvent and did on or about February 25th, 1893, make an assignment for the benefit of its creditors under the insolvent laws of said state and that proceedings under said assignment were duly begun and are still pending in the Probate Court of said County.

Plaintiff further says that the said defendant Corporation is indebted to this plaintiff upon its certain promissory note duly made by it in form as follows, to-wit:

$200.00. Norwalk, Ohio, Dec. 9th, 1892.

Sixty days after date we promise to pay to George Putter or order, two hundred dollars, with interest at 6% per annum, for value received.

The Incandescent Light & Power Co.,
Per Charles Suhr, Sec'y.

Plaintiff says that there is now due him upon said note from said defendant Corporation the sum of two hundred dollars with interest thereon from December 9th, 1892, that he duly demanded payment thereof, of said Corporation upon the day and date the sums became due, that it then and there refused payment thereof and still refuses payment.

Plaintiff further says that the said defendant Corporation has numerous creditors that their names and places of residence are unknown to him, and that this action is prosecuted in the interest and behalf of all such creditors as well as in the interest and behalf of plaintiff.

Plaintiff further says that he is ignorant of many facts that the Court should know to render a proper decree herein, that knowledge of such facts is in the possession of the said Corporation, its officers or agents and that plaintiff cannot safely proceed to the hearing hereof unless said corporation, its officers or agents are compelled to make disclosures thereof under oath.

Wherefore by reason of the premises the said plaintiff prays that the said Charles Suhr as Secretary or the said David W. Vail as President of said Corporation may be required to answer under oath the interrogatories hereto annexed, that the Court shall find the names and residences of the stockholders of said defendant Corporation with the amount of stock owned by each of them respectively, that the Court shall find and ascertain whether said shares of stock held by each of said stockholders has been fully paid for or otherwise, and if not fully paid for the amounts still due thereon, that an account may be taken of the creditors of said Corporation and the amount due to each of them respectively from said Corporation, that each of said stockholders may be ordered to pay into Court such an amount of money in satisfaction of said indebtedness as shall be in proportion to the amount of stock held by each of said stockholders and all the solvent stockholders, but not

exceeding in amount the par value of stock owned by each, that the Court may order paid from said fund arising from such payments the payment of the costs of this action, including a reasonable fee to plaintiff's counsel, and the claims of all of such creditors as shall come to the knowledge of the Court and for such other, further and different relief as may be just, proper and equitable.

Stephen M. Young,
Att'y for Pl'ff.

State of Ohio, Huron County, ss.

Stephen M. Young, being duly sworn on oath says that he is the duly authorized attorney of the plaintiff in the above entitled action, that the said plaintiff is a non-resident of the State of Ohio and of the County aforesaid but is a resident of Chicago, Illinois; that said plaintiff is not present within said County, and that for that reason this affiant makes oath herein.

Affiant further says that the allegations and averments of fact set forth in the above petition are true as affiant verily believes.

Stephen M. Young.

Sworn to before me and signed in my presence this 9th day of March, A. D. 1893.

Emma Gilbert,
Dept. Clerk.

INTERROGATORIES

1st. Give the name and place of residence of each subscriber to the capital stock of the defendant Corporation, together with the amount of each subscription and the date of subscription?

2d. Give the name of all transferees of stock, the date of the transfer, the name of the transferror and the amount of stock transferred in each instance?

3rd. Give the amount of money paid by each subscriber of stock who have never paid for the stock subscribed, if any such there are, with the amount of each such subscription?

4th. Give the amount of money paid by each subscriber of stock for his stock, and if anything other than money was received by said Corporation for any shares of its capital stock, state what it was, from whom was it received and what was the valuation thereof as agreed upon?

5th. What stockholders, if any, are creditors of said corporation and for what sums respectively?

6th. What amount of money has been received by said Corporation in cash, as and for amounts due from subscribers to its capital stock upon such subscriptions?

7th. What property, if any, has been received, transferred or delivered by or to said Corporation in lieu of money, in payment of subscriptions for its stock?

8th. If any shares of said capital stock have been subscribed for, but are not yet fully paid for, state who the subscribers therefor are and the amount still due thereon?

9th. Give the names, residences of all persons in whose name stock in said Company is now standing, together with the amount now owned by each of said stockholders.

To the Clerk of said Court:

Issue summons in above action for Thomas Dunmore, Frank Link, Frederick Colson, Benjamin Niman, Arthur L. Osborn, Isaac W. Bostwick, ... Hester, Charles Suhr, Daniel H. Fox, Robert N. Rood, David C. King, Eugene Smith, William E. Gill, William E. Sidnall, David W. Vail, Delos O. Woodward, and George Butt, directed to the sheriff of Huron County, Ohio, and for William Huntington and Ed. D. Sawyer, directed to the sheriff of Cuyahoga County, Ohio, and for James R. Allen to sheriff, Summit County, Ohio, also for The Incandescent Light & Power Company of Norwalk, Ohio, a corporation organized under the laws of Ohio and of which David W. Vail is President and Charles Suhr is Secretary, directed to the sheriff of Huron County, Ohio. Make said writ returnable according to law. Endorse. Brought to enforce statutory liability.

Stephen M. Young,
Att'y for Pl'ff.

DEFENDANT'S EXHIBIT G

O.K. as to form—H. C. L., E. F. B.

CONTRACT

This agreement made and entered into in duplicate at Norwalk, Ohio, this 16th day of July, A. D. 1895, by and between The Northern Electric Company, of Norwalk, Ohio, and the City of Norwalk, Ohio, witnesseth, that:

The said Company for the consideration hereinafter appearing and under the terms and conditions and subject to the provisions hereinafter expressed, does hereby promise, covenant and agree to and with the said City, to erect, operate and maintain for the full term of ten (10) years from and after the 1st day of September, A. D. 1895, within the corporate limits of said City for the purpose of lighting the streets, alleys avenues, and other public places thereof, ninety-eight (98) electric arc lamps (or more, if said city should desire them as hereinafter provided) of nominal two thousand candle power and of the newest and latest improved type and equal to any arc lamp now in use in other cities and to be so operated and maintained during all of said period of ten years as to produce and emit therefrom a pure light equal in brilliancy to that produced by the electric arc lamps of any other city; and that all of said ninety-eight arc lamps, and any others that said City may hereafter require, as hereinafter provided for, shall burn and be kept in operation upon each and every night during said term of ten years from one-half hour after sunset until twelve o'clock midnight, standard time.

Said arc lamps shall be supplied at all times with a current of not less than 9 6/10 amperes, requiring four hundred and fifty watts for maintenance, and to be tested at any time whenever the Council of said City may desire it by an inspector, authorized by said Council, by measurements made at the lamp terminals where no sensible resistance is included in series with the arc; and in case resistance is used, it must be excluded in the measurement of the voltage, and the carbon used in said arc lamps shall be of the first grade and quality.

Said Company, in consideration of the premises, hereby promises to, and agrees with said City that during said period, it will furnish said City all the incandescent lights of the newest and best improved kind that are or may be required for lighting all municipal buildings, offices and rooms in said City and that said incan-

descent lights will furnish sufficient light for said buildings, offices and rooms and will be satisfactorily maintained and operated.

In further consideration of the premises, said Company further covenants and agrees with said City that for the purpose of furnishing power and generating electricity for said arc and incandescent lights, it will build and construct in said city and during said period of ten (10) years will continuously keep in operation a first class electric light plant, which shall consist of a brick and stone building of sufficient size and convenient construction, with a brick smoke-stack, to be equipped during all of said period with all the modern appliances for furnishing and maintaining good, regular, continuous and satisfactory lighting service; that said plant shall contain during all of said term of ten years, arc dynamos of a total capacity of at least one hundred and fifty regular electric arc lights and boilers and engines of at least double the amount of power necessary to furnish electricity for and keep in operation all the arc lamps used in said City for such public lighting; and that all of the machinery contained in and about said plant and connected therewith shall be of the best and most improved pattern and kind and shall be kept in as good repair and condition as new, natural wear and tear excepted.

Provided, that all improvements over present modes and methods of producing electric lights for street and municipal purposes, the right to use which shall hereafter and during the time of the existence of this contract, be owned or acquired by said Company, shall be used and applied for the use and benefit of said City in the lighting of the streets, avenues, alleys and other public places under this contract.

Provided, that said Company shall at the request of said City, by and through its Council, under like terms and conditions, erect, operate and maintain at any time within said term of ten years, such electric arc lamps in addition to the ninety-eight hereinbefore prescribed, as said City through its Council may require, said additional lamps and each of them to be ready for operation within thirty (30) days from the time written notice is served by said City upon said Company, or agent or employee thereof having charge of its business in said City, that the same are required, and from the time such additional lamps are in full operation and so long as they are so maintained, the said Company shall receive from said City for each thereof the same compensation as is

hereinafter stipulated for each of said ninety-eight arc lights hereinbefore agreed to be erected and maintained.

Provided, however, that such additional lamps shall be erected, operated and maintained at such points in, along, or upon the streets, avenues, alleys, or other public places within said City as shall be designated by the Council thereof, or by some person thereunto legally authorized by said Council, and the said City through its Council, shall have the privilege of requiring said Company, from time to time, as the necessities of said city require, to change the location of said lamps, including the said ninety-eight hereinbefore mentioned, or any of them, upon payment by said City of the reasonable cost of said change of location, said cost to be determined by the Engineer of said City by estimate thereof before such change is made, and such estimate to be conclusive upon the parties hereto.

Provided further, that the said Company shall have the right to the reasonable and necessary, but not exclusive, use and occupation of the streets, avenues, alleys and other public places of said City for the purpose of erecting, operating and maintaining its said lamps, and the necessary poles, wires and fixtures therefor, and

Provided further, that all loss, damage or cost caused by or arising out of any defective or improper material or appliances used by said Company in erecting, operating, or maintaining said lamps, or from the neglect, carelessness or wantonness of said Company, its agents, or employees in and about the work and labor of erecting, operating or maintaining said lamps, or any of the machinery, implements, appliances or fixtures used in erecting, operating or maintaining the same, or from the use or occupation of said streets, avenues, alleys, or other public places for any purpose by said Company, shall be borne, defrayed and wholly paid by said Company, and the said Company shall save said City harmless therefrom, and defend and protect it against all suits in law or equity founded thereon.

Provided further, that in its said use and occupation of said streets, avenues, alleys and other public places, said Company shall be under the control of the Council of said City, and shall obey all reasonable and proper restrictions and limitations imposed by said Council upon said use and occupation provided that nothing herein contained shall warrant the construction that said Council may in any way impair the obligation of this contract, or prevent said company from carrying out the same.

Provided further that the said City may at its option and upon giving said Company thirty days' written notice of its intention so to do, purchase the said plant to be erected by said Company in said City as hereinbefore stipulated, with all rights, easements, fixtures, appliances and appurtenances used or necessary in the lighting of said City at the fair and reasonable cash value thereof in money as the same shall be at the date of the appraisement hereinafter provided for, to be ascertained and determined as follows, to-wit: Said Company shall select one competent, disinterested and impartial appraiser, conversant with the value of electric light plants and electric light apparatus and appliances; the said City shall select one other such appraiser, and the two appraisers thus selected shall select a third who is likewise competent, impartial and disinterested, and the valuation as fixed in writing by said appraisers or any two of them, shall determine the amount to be paid by said City as the consideration for such purchase; and upon payment thereof being made by said City, it shall by the proper and necessary written instrument to be duly executed by said Company in the event of such purchase, acquire all the rights of said Company in and to said plant with all rights, easements, fixtures, appliances and appurtenances thereunto belonging, and from that time, it shall be the duty of said Company to defend the said City in the enjoyment thereof and the right to the use of all patented inventions connected therewith, and to save said City harmless against all claims and demands for any infringements by reason of such use; Provided, that if after such appraisement is completed, said City for any good cause, does not desire to consummate the purchase of said plant and the property connected therewith, said City shall have the right to withdraw therefrom and not be bound thereby upon paying the reasonable cost and expenses of such appraisement.

Provided further, that all wires, erected by said Company in said City for the purpose of conducting electricity on and along its streets, avenues, alleys, and other public places of said City for such street and public lighting, shall be covered with a water-proof insulation and all of said wires and the fixtures connected therewith for the purposes of such municipal public lighting shall be so located and arranged so as not to interfere with the successful operation of existing telegraph and telephone wires in said City;

Provided further that the said Company shall not assign any right or interest acquired under this contract

without the express consent of said City Council, duly recorded in the records of said City; and provided further, that if said Council should consent to such assignment, the assigns of said Company or its successors in interest shall be as fully bound by this agreement as is the said Company;

Provided further, that should said Company at any time during said term of ten years from any cause within its power to prevent or which by ordinary prudence could have been foreseen, fail for the period of thirty consecutive days to operate and maintain the lamps by it erected under the terms and conditions of this contract, or any considerable portion thereof, or if the said Company shall fail without justifiable reason to furnish additional arc lamps in compliance with the provisions of this contract or agreement, or if the said Company shall fail to save said City harmless against all loss, damages, or costs herein agreed to be by said Company borne, defrayed and paid, or if the said Company shall fail to comply within a reasonable time to such reasonable and proper restrictions and limitations as shall or may be imposed by the Council of said City upon the use and occupation by said Company of the streets, avenues, alleys and public places of said city, then in either or any of such cases of failure as aforesaid, the said Company shall lose and forfeit all rights acquired by it hereunder, and the Council of said City may declare this agreement or contract at an end and from that time, the same shall not be obligatory upon said City, and the determination of said Council upon and as to the facts upon which its rights to declare such forfeiture may exist, shall be final and conclusive upon the parties hereto.

And the said City on its part, and in consideration of the stipulations, promises, and agreements of said Company, does hereby promise, agree and undertake that the said Company shall have the right, under the conditions, terms and provisions of this contract and subject to the limitations herein expressed, to use and occupy the streets, avenues, alleys or other public places of said City for the purpose of erecting, operating and maintaining electric lights for such municipal and public lighting, provided, however, that nothing herein contained shall permit said use or occupation after the expiration of said ten years, or shall unreasonably restrict the Council of said City in its proper and lawful control of said streets, avenues, alleys, or other public places, or shall prevent the said Council from revoking said

Company's said right to so use and occupy said streets, avenues, alleys, or other public places for any reason for which a forfeiture may be declared against said Company hereunder, or from revoking the grant of said right for non-user or mis-user thereof through the failure of said Company to furnish said public, municipal lighting as herein provided for; and provided further that said Company shall bear, defray and pay all or any loss or damage that may be occasioned by reason of said use or occupation, or growing out of the same and save said City free and harmless against the same.

Provided further, that said City shall have the right to use the poles erected and maintained or that may be erected and maintained, by said Company or any of said poles in, along or upon any street, avenue, alley or other public place of said City for the purpose of maintaining a fire-alarm, or for any other public purpose not conflicting with the use of said poles by said Company, and the said use by said City of said poles shall not be subject to any charge by said Company.

And in further consideration of the premises, the said City hereby agrees and undertakes to pay to the said Company upon the first regular meeting of its Council in each month during said term, the full sum of five dollars and eighty-three and one-third cents ($5.83 1/3) for each and every of said arc lamps erected, operated, and maintained under this contract during the whole of the preceding month, and a ratable proportion of such sum for each fraction of such preceding month, provided that such payment shall not be made until all of the ninety-eight arc lamps herein stipulated for, shall have been erected and operated, nor shall more than ninety-eight of such lamps be paid for unless the excess thereof have been erected, operated and maintained, as hereinbefore provided for; and in further consideration of the premises, said City hereby promises, agrees and undertakes to pay to said Company upon the first regular meeting of its Council in each month during said term the full sum of fifteen cents (15c) per thousand watts for all of said incandescent lights erected, operated and maintained under this contract, except in Mayor's Office and Council Chamber, during the whole of the preceding month and a ratable proportion of such sum for each fraction of such preceding month, provided that no more of such incandescent lights shall be paid for than the Council of said City shall require for lighting the municipal buildings, offices and rooms under the terms of this contract; but it is hereby mutually agreed by and

between the parties hereto that the Council Chamber of said city and the office of the Mayor thereof shall both be lighted by said Company free of any charge and that said Company shall light the said Council Chamber and Mayor's Office with incandescent lights of the same kind and equal to the lights used for lighting the other municipal buildings and rooms of said City, and that such lighting will be done satisfactory to the Mayor and Council of said City.

Provided, further, that if from any cause, there shall be a failure of said arc lamps or incandescent lights or any of them, to produce the light required of them, under this agreement, then in such case the said City shall pay only of such agreed sum or sums, such proportion as shall be just and proper, and the determination by the Council of said City as to the amount which shall be just and proper under such circumstances shall conclude the parties hereto.

In testimony whereof, the said Company has caused this agreement to be executed by its President, attested by its Secretary, and sealed with its corporate seal, and the said City has caused it to be signed by its Mayor, attested by its Clerk, and sealed with its municipal seal, all of which is accordingly done the day and year first above written.

The Northern Electric Company.
By George P. Jones, President.
Attest: B. P. Foster, Secretary.

Signed, sealed and delivered in the presence of:
Frank D. Wickham (Seal)
Fred L. Prentiss

The City of Norwalk, Ohio,
By F. W. VanDusen, Mayor. (Seal)
Attest: F. W. Christian, City Clerk.

(Seal) (Seal)

* * * * *

Jump moved that the bond of the Northern Electric Co. be referred to the Finance Committee. Lee seconded. Motion lost. Yeas, 3, Jump, Lee, Wheaton, Nays 6, Bloxham, Moore, Owen, O'Brien, Prentiss, Somers.

Moore moved that the bond of the Northern Electric Co. be approved. Motion carried. Yeas, 6, Bloxham, Moore, Owen, O'Brien, Prentiss, Somers. Nays, 3, Jump, Lee, Wheaton.

* * * * *

Moore moved that the matter of the Washington Street sewer outlet be referred to the street committee. Lee seconded. Motion carried.

On motion of Wheaton, seconded by Jump, the Council adjourned.

A. S. Prentiss, President of the Council.
Attest: F. W. Christian, City Clerk.

DEFENDANT'S EXHIBIT H

O.K. as to form—H. C. L., E. F. B.

FORM OF CONTRACT

This agreement made and entered into in triplicate at Norwalk, Ohio, this 13th day of April, 1905, by and between the City of Norwalk, Ohio, (hereinafter designated as city), and The Cleveland and Southwestern Traction Company (hereinafter designated as contractor) hereby mutually contract, covenant and agree that:

1. The contractor shall erect and install adequate and necessary generating plant and machinery, overhead distributing system and buildings and shall furnish all labor, materials, apparatus, fuel, renewals, repairs and other things necessary for and incident to the successful supply of street lighting service as herein specified. That said street lighting service shall consist of the maintenance and operation, for the full term of ten years beginning on the first day of September, A. D. 1905, of 100 or more arc lights of the kind and description hereinafter designated, each and all of said 100 or more arc lights shall be operated on each and every day of the said ten years, and shall burn from ½ hour after sunset to 1 a.m. standard time.

In consideration of the maintenance and operation of each of said 100 or more arc lights, the said city shall pay to the said contractor the sum of sixty-five dollars

($65.00) per lamp, per year, during the life of this contract.

The bills for the payment of the said price, shall be presented by the contractor for the approval of the Board of Public Service or such other board or officer as shall have charge of the said lighting under the laws of the state of Ohio, at the first regular meeting thereof in each month, and the payments therefor shall be made by the said city as soon thereafter as the proper officials of the said city can take official action thereon. With each monthly bill said contractor shall present an itemized statement showing how many hours any of the lights contracted for hereunder failed to burn, which said statement the city reserves the right to verify before payment is made for the bill then rendered.

2. The initial installation of lamps shall be one hundred (100) in number and the contractor shall install additional lamps from time to time, during the life of this contract, upon the written order of the Board of Public Service, or their successors, and shall maintain and operate the said additional lights until the expiration of this contract, at the price per lamp, per year, as above stated, and in conformity with the schedule of operation, said lamps to be placed in regular operation within thirty days from the date of the order of their installation.

3. All of said 100 or more are lights shall be erected, operated and maintained, by said contractor at such points in, along and upon the streets, alleys, and other public places of said city as shall be designated by said Board of Public Service, or its successors, and the said city reserves the right to order any light changed as to location, the cost of which change shall be paid by the said city to the contractor, but shall not exceed an estimate of the same which shall be made by the City Engineer or some other officer of the said city directed to make the estimate by the Board of Public Service.

4. All are lamps are to be of standard general construction and adapted and adjusted for six and six-tenths (6.6) amperes of alternating current at a frequency of seventy-two (72) cycles per second. Each and all lamps are to be adjusted for and operated with a net expenditure of not less than four hundred watts of electrical energy at the arc, said expenditure of energy to be exclusive of energy required in lamp mechanism, line, station regulators, transformers or other apparatus.

The transforming and regulating apparatus is to be so adjusted that the current on any of the various arc circuits will not vary more than one-tenth of an ampere

from the normal line current of six and six-tenths (6.6) amperes.

Each and all of said lamps shall be adjusted for and be maintained at approximately seventy-two (72) volts across the arc and the sensitiveness of the regulating mechanism must be sufficient to present any wide or continued variation from said voltage.

Each lamp shall be fitted with a light opal or clear inner globe (at the option of the city) and a clear outer globe and the contractor shall at all times maintain the lamps with proper, sound and clean globes.

All carbons shall be of the first grade and quality, shall be of a uniform texture and size and of the most suitable for the kind of service rendered, and must burn uniformly and give a clear, steady light. Samples of the kind of carbon used shall be submitted upon demand, from time to time, and if the said carbons are not equal to the kind required herein, then such deduction shall be made for that month's lighting as the city shall deem just and equitable.

Each lamp shall be fitted with a substantial porcelain lined metal reflector of sufficient size and so shaped as to afford a good distribution of light over considerable distance from the lamp.

All lamps shall be of such design and proportion as not to cast noticeable shadows around or under the lamp. All lamps to be enclosed in weather proof cases of brass, zinc or copper, all exposed parts to be coated with a durable lacquer or enamel. Each lamp to be fitted with an improved type of high voltage insulating hanger and absolute cut-outs so that a defective lamp can be replaced while the circuit is in operation.

All parts of every lamp are to be maintained in as nearly the condition set forth herein as possible, and all repairs are to be made within fifteen days after any defect is noticed or attention is called to the fact by the city.

5. The station apparatus and distributing system must be of such size and character, and must be so installed as to admit of reasonable extension of the system and increase in the number of lamps which may be necessary by reason of the growth of the city. The contractor shall keep in readiness sufficient repair parts to insure against serious or continued breakdowns or failures of generating apparatus or distributing system.

The globes shall be thoroughly cleaned at least once every two weeks, and shall at all times be kept clean and free from movable dirt or deposit of any kind, and if not so kept, one-half of the contract price of the lamps hav-

ing such unclean globes shall be forfeited for the month in which such failure occurs. Provided, however, that no deduction shall be made for any movable dirt or deposit which accumulates between trimmings, but only for movable dirt or deposit which is allowed to remain after trimming.

If for any cause whatsoever, any lamp or lamps fail to consume and utilize electrical energy equal to the standard fixed, a deduction shall be made from the prices to be paid under this contract, which deduction shall be proportionate to the decrease in wattage. Lamps which become extinguished shall be deducted for from the time such failure to furnish lighting occurs; and in case said failure is reported for part of a night, deduction shall be made for the entire night. In case of any failure to maintain the lamps or circuits in the most efficient working condition, or to furnish the required electrical energy as stipulated in these specifications and contract, pro rata reductions on account of such failure, shall be made from the payment due or becoming due to the contractor. If the entire street lighting system, complete circuits or any lamps of the same, shall fail to burn for a period of five or more consecutive days during any of the ten years covered by this contract, a deduction double the pro rata pay for that period, shall be made from the amount due or becoming due to the contractor.

6. The said city shall have, at any time during the life of this contract, the right and privilege to install in the said contractor's generating plant, electrical recording instruments in connection with any or all lighting circuits for street lighting and all proper and necessary connections for said instruments shall be made by the said contractor without expense to the city. The said instruments to be placed in a suitable cabinet fitted with glass doors, which shall be furnished and erected by the said contractor. Said enclosure or cabinet to be well lighted and access to the same shall be had only by the city or its duly authorized agent. All instruments and fittings furnished by the city are to remain its property. The instruments are to be properly fused and connected to circuits on generator side of lighting arresters with suitable choke coils connected on station side of arresters. All connections from the generating plant switch board to the external circuits and the instrument circuits shall be kept in open view and shall be readily accessible throughout their entire length.

The accuracy of any recording instrument owned by the city and maintained in the generating plant will be

checked by a disinterested expert upon written demand of the contractor and when tested upon such demand of the contractor and found to be within five per cent. true, the contractor shall pay the costs of said test, otherwise the costs of such test shall be paid by the city.

The city or its duly authorized agents, shall have the right, at any time, to tap the various circuits at any point for the purpose of making such readings and tests, as may, in the opinion of the city officials, be necessary for determining whether or not the terms of the contract are being complied with. The expense of all tests so made by the city which prove a non-compliance with the provisions of the contract on the part of the contractor, shall be borne by the contractor. All other tests ordered or made on behalf of the city shall be made at the expense of the city.

Provided, that if at any time during the life of this contract, said city of Norwalk should desire to use any lamps of an improved and more modern pattern and power than those installed under the terms of this contract the same may be done, and the expense of such change shall be borne by the city and contractor in such proportion as may be mutually agreed upon.

7. All lamps, unless otherwise specified, shall be hung from suitable steel cable spans, the city reserving the right to demand at any time the use of swinging mast irons in lieu of the steel cable spans for the suspension of not more than twenty per cent of the lamps. Unless otherwise ordered, all lamps shall be hung over the center lines of the street, and shall be so placed at street intersections that each of the intersecting streets may be properly lighted thereby.

In general all arc lamps shall be suspended at elevations ranging from eighteen to twenty-three feet, but the city reserves the right to indicate the exact location and elevation, within said limit of eighteen to twenty-three feet, and also the right to order not more than ten per cent of the lights to an elevation of not to exceed thirty-five feet. All steel cable spans shall be fitted with adjusting suspension belts, and shall be maintained free from excessive sagging. All lamps and wire to be new and no lamps or wire which have previously been used shall be permitted to be erected or installed.

8. The arc lights are to be run on at least two independent circuits, and each circuit shall be loaded as nearly equal as possible, and are to be run so that the down town lights shall be part on one circuit and part on another.

The various circuits to be equipped with suitable switches at the generating plant, so that overhead wiring troubles will not cause a general suspension of lighting service.

On the occurrence of any fire in any district in which said contractor shall have wires, said contractor shall be under the direction of the officers of the fire department, and shall obey any orders given by said officers during said emergency. Great care must be taken by the contractor to maintain the street lighting circuits free and clear from foliage or limbs of trees and from other electrical circuits, or wires. The plant and distributing system generally shall conform to the rules and requirements of the National Board of Five Underwriters and shall be maintained and operated in conformity with said rules and requirements.

9. Within sixty days from the beginning of service under this contract, the contractor shall furnish to the city a complete map of all street lighting circuits showing connections and routes of various circuits and the location of all street lamps. Said map must be corrected within thirty days after any change shall have been made in the location of any of the lamps or circuits, or any additions shall have been added thereto. Said corrections shall be made on a new map, leaving the old one on file in the said city for reference.

10. All wood poles shall conform to the standard specifications of white cedar poles, as adopted by the Northwestern Cedarmen's Association, and particular regard will be given in choosing only the very best for lamp suspension purposes. All proper precaution must be taken in setting and guying to prevent possible disarrangement in alignment, and change from the perpendicular.

No unused cross arms, brackets, unsightly ends, coils of wire, etc., will be permitted, and the workmanship and arrangement shall be done with all due regard to the aesthetic point of view.

All poles and cross arms must be neatly painted within six months from the first of May, 1905, and must be kept in such condition during the life of this contract.

The contractor may employ any poles now on the streets on proper permit from the owner, provided, however, that in so doing there would arise no conflict with the letter or spirit of this contract.

The city may enter upon and use any poles employed under this contract, in the service of the fire and police departments of said city, for the purpose of affixing and supporting wires, fire alarm and police patrol boxes, etc.

11. Any damage done to drains, paving, streets, or other public or private property during the construction or extension of the work, shall be promptly repaired to the satisfaction of the said city. If poles, posts or any other material connected therewith require repairing, in the opinion of the said city, due to unsightly or dangerous condition, the same shall be repaired by said contractor within twenty-four hours after notice from the city, and all such repairs if not made promptly and to the satisfaction of the said city and within the time above mentioned, may be made by the city or its agents and all expense incurred therein may be deducted from money due or to become due the said contractor under this contract.

It is further agreed that if poles or posts at any time during the life of this contract need painting, straightening, etc., the same shall be done by the contractor within a reasonable time from date of written notice to such effect from the city served on said contractor or agent; that if any lamp or lamps are defective or operating improperly and notice be given the contractor to that effect the same shall be repaired or replaced at once to the satisfaction of the city, and if such straightening, painting, or repairing be neglected and said lamps fail to receive prompt attention, then the city as before, may proceed in making all repairs, providing, if necessary, new lamps, and may deduct all expenses incurred thereby from any money due or to become due said contractor under this contract. Provided, however, that all painting of poles shall be done under the requirements of the general ordinances of the said city; and that defective apparatus shall be deducted for as hereinbefore provided.

12. Approval by the city authorities does not excuse defective work, improper material, lamps, supplies, etc., and any such approved material, supplies, lamps, work, etc., which prove defective and do not fully comply with the letter and spirit of this contract shall be reconstructed or replaced by said contractor on request of said city.

13. Said contractor agrees to provide, in addition to the arc lamps mentioned herein, a sufficient number of incandescent lights to properly light the city offices, fire and police stations and water works pumping station, the total number of lights to be installed not to exceed 40, 16 candle power incandescent lights and to maintain the same during the life of this contract during all hours when the regular plant is operated, without charge to the city.

14. Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its said lamps, wires, poles and apparatus, but in such use of said streets, alleys, and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon said use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this contract or prevent said contractor from carrying out the same, and provided further that nothing herein contained shall permit said use or occupation of said streets, alleys and other public places after the expiration of this contract, to-wit: August 31, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns hereunder, or from revoking the grant of said rights for nonuser or misuser thereof through failure of said contractor or assigns to furnish such street, commercial and residence lighting to the said city, and the residents and inhabitants thereof, or otherwise.

The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred.

15. Should said contractor or assigns at any time during the life of this contract, from any cause within its power to prevent, or which by ordinary prudence could have been foreseen, fail for the period of fifteen consecutive days to operate and maintain the lamps by him erected for street lighting, or any portion thereof, or should said contractor fail without justifiable reasons to furnish all additional lamps ordered in compliance with the provisions of this contract; or fail to supply all demand for electrical energy for commercial and residence lighting, or fail to save said city harmless against all loss, damage or cost herein agreed to be by said contrac-

tor borne and paid, or fail to comply within a reasonable time with such reasonable restrictions and limitations as may be imposed by said city, then and in either of such cases of failure as aforesaid the said contractor shall lose and forfeit all his rights acquired under this contract.

And in case said contract is forfeited as aforesaid provided, said city shall have the right at once, at the cost and expense of said contractor, to provide temporarily for lighting such highways and public places, or any part thereof with electricity, gas or otherwise, until a new contract can be made by the proper authorities of said city.

16. The said contractor further contracts, covenants and agrees that all loss, damage or costs caused by or arising out of any defective material or appliances used by said contractor in erecting, operating or maintaining said lamps, or said system of lighting, or from neglect or negligence of said contractor, its agents or employees in and about the appurtenances used in erecting, operating or maintaining the said lamps or system, or from the use of streets, alleys and other public places for any purpose by said contractor, shall be borne and paid by said contractor, and the said contractor shall save said city harmless therefrom and defend and protect said city against all suits either in law or equity founded thereon.

17. Any employe of said contractor who continually and arbitrarily violates the letter and spirit of this contract and thereby makes himself disagreeable to said city and its officers, shall, upon request of the said city, be dismissed by said contractor.

18. Said contractor shall, within thirty days hereafter, and at the time this contract is accepted, give a bond in the sum of five thousand dollars ($5,000.00) with sureties to the acceptance of the said city, conditioned for the faithful performance of the conditions of this contract on the part of said contractor to be performed. Said bond so given shall remain in full force and power during the entire period of this contract and for a further time until all property of said contractor has been removed from the streets, alleys and public places of said city and for a further time until all litigation caused by the occupancy of the said streets by said contractor, or which directly or indirectly affects said contractor, shall have reached final judgment and settlement.

19. The said contractor shall file with the clerk of the Council of said city, within thirty days after the awarding of this contract, his written acceptance of same, and thenceforth shall be bound thereby, and this contract

shall not bind said city until such acceptance is filed. Any assignment hereof by said contractor shall not bind said city, nor release said contractor, except there be filed by said assignee a like acceptance of the terms of this contract, and an additional bond by said assignee in like sum and with like conditions.

20. In testimony whereof, the said contractor has caused this agreement and contract to be executed and signed by its president, attested by its secretary and sealed with its corporate seal, and the city has caused it to be signed by its mayor, auditor and board of public service attested by its seal, they thereto being duly authorized, all of which is done the day and year first above written.

The Cleveland & Southwestern Traction Co.,
By F. L. Pomeroy, Pres.
E. F. Schneider, Secy.

C. W. Anderson, Mayor
T. P. Kellogg, Auditor.

Emil O. Friend
A. S. Prentiss
L. E. Doane
Board of Public Service, Norwalk, Ohio.

(Seal of The Cleveland & Southwestern Traction Co.)
(Seal of the Mayor of the City of Norwalk.)
(Seal of City Auditor.)
(Seal of the City of Norwalk.)

Signed in Triplicate
Triplicate

BOND

Know all men by these presents: That we, the Cleveland & Southwestern Traction Company as principal, and The Bankers Surety Company, as sureties are held and firmly bound unto the City of Norwalk, Ohio, in the sum of five thousand dollars ($5000.00), to be paid to said city, its successors or assigns, for which payment well and truly to be made we do hereby bind ourselves, our heirs, successors, assigns, executors and administrators, jointly and severally, firmly by these presents.

Signed by us this 13th day of April, 1905.

The condition of the above obligation is such that whereas the said The Cleveland & Southwestern Traction Company has on this 13th day of April, 1905, entered into a contract with said City of Norwalk, Ohio,

for lighting the streets, etc., now if the said The Cleveland & Southwestern Traction Company shall well, honestly and faithfully discharge and perform all and singular the obligations of said contract as therein specified, then this obligation shall be void; otherwise to be and remain in full force and virtue in law.

The Cleveland & Southwestern Traction Co.,
By F. L. Pomeroy, Pres.
J. O. Wilson, Asst. Secy.
The Bankers Surety Company,
Harvey D. Goulder, President.
Attest: Herman H. Burgess, Secretary.

(Seal of The Cleveland & Southwestern Traction Co.)
(Seal of The Bankers Surety Company.)
(Seal of the City of Norwalk.)

DEFENDANT'S EXHIBIT I

O.K. as to form—H. C. L., E. F. B.

Council Record of the City of Norwalk, Ohio,
Dated April 18, 1905.
(Vol. 8, p. 432.)

COUNCIL RECORDS

"City Council Chamber, Norwalk, Ohio,
April 18, 1905.

The Council of the City of Norwalk, Ohio, met in regular session with President Blume, Clerk Kellogg and Councilmen Berkeley, Chaffee, Cole, Hill, Koenig, Lee and Smith present. Absent none.

President Blume presided and called the meeting to order. The minutes of the preceding meetings were read and approved.

The following acceptance of the contract for lighting the City was read:

'Cleveland, Ohio, April 14, 1905.
To the Clerk of the Council of the City of Norwalk, Ohio.
Dear Sir:

Under clause 19 of the lighting contract signed between our Company and your City under date of April 13th, 1905, we hereby accept the contract and agree to conform to the terms and conditions of same.

Kindly acknowledge receipt of this acceptance and oblige.

Yours very truly,
The Cleveland & Southwestern
Traction Co.,
By F. L. Pomeroy, President,
J. O. Wilson, Asst. Secy.'

On motion of Smith and second of Koenig the letter was ordered spread on minutes of Council.

* * * * *

A Resolution.

Be it resolved by the Council of the City of Norwalk, Ohio, that the bond submitted by the Cleveland & Southwestern Traction Company to secure the proper performance of the contract awarded to them by the Board of Public Service for lighting the streets of the City of Norwalk, Ohio, as signed by the Bankers' Surety Company, of Cleveland, Ohio, as surety, be and the same is hereby approved.

On motion of Smith and second by Cole, the resolution was passed. Yeas, 7, Berkeley, Chaffee, Cole, Hill, Koenig, Lee & Smith. Nays. 0.

On motion of Berkeley and second by Cole, the council adjourned to Friday evening, April 21st, 1905.

B. A. Blume, President of Council.
Attest: T. P. Kellogg, Clerk of Council.''

DEFENDANT'S EXHIBIT J

Approved as to form—E. F. B., H. C. L.

COUNCIL RECORDS OF THE CITY OF NORWALK
January 20, 1914

City Council Chamber,
Norwalk, O., Jan. 20, 1914

City council met in regular session with President Pro Tem Cole presiding, President Holiday acting as Mayor in the absence of Mayor Martin. Clerk Christian and the following members were present: Cole, Fifner, Haas, Heston, Smith, A. C. Smith, C. R. Spurrier. * * *

On motion of Heston, seconded by Fifner, the request of the C. S. & C. Electric Railway Company to withdraw its ordinance asking for a twenty-five year lighting franchise was granted, Ayes, 7. * * *

On motion of Fifner, seconded by Haas, council adjourned.

R. L. Christian, Clerk.

F. B. Cole, President Pro Tem.

I, F. G. Warner, City Auditor and Clerk of Council, of the City of Norwalk, Ohio, hereby certify that the copy hereto attached to be a true copy of the motion passed and recorded in council records Vol. 7 page 145.

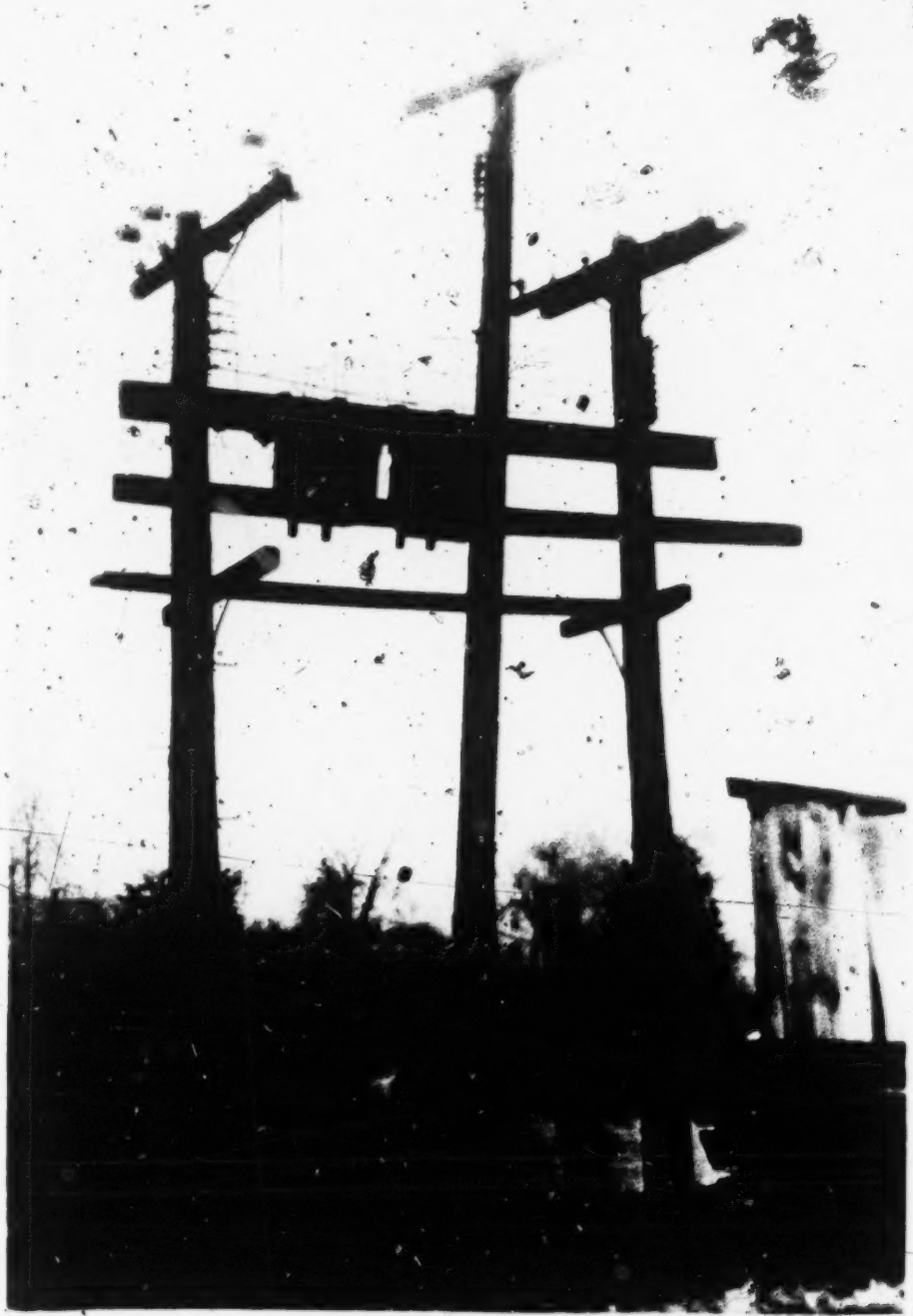
F. G. Warner,
City Auditor and Clerk of Council.

DEFENDANT'S EXHIBIT K

Photograph taken November 11, 1930, showing in the center foreground a pole of the Ohio Electric Power Company, located in front of No. 200 East Main Street in the City of Norwalk, Ohio, with transformer and 2200-volt primary and secondary lines of wires attached thereto.

DEFENDANT'S EXHIBIT L

Photograph taken November 11, 1930, showing in the center foreground a pole owned by the Ohio Electric Power Company standing in front of No. 208 Whittlesly Avenue in the City of Norwalk, Ohio, with 2200-volt primary and secondary wires attached thereto. The pole is broken off at the bottom and leaning in the trees.

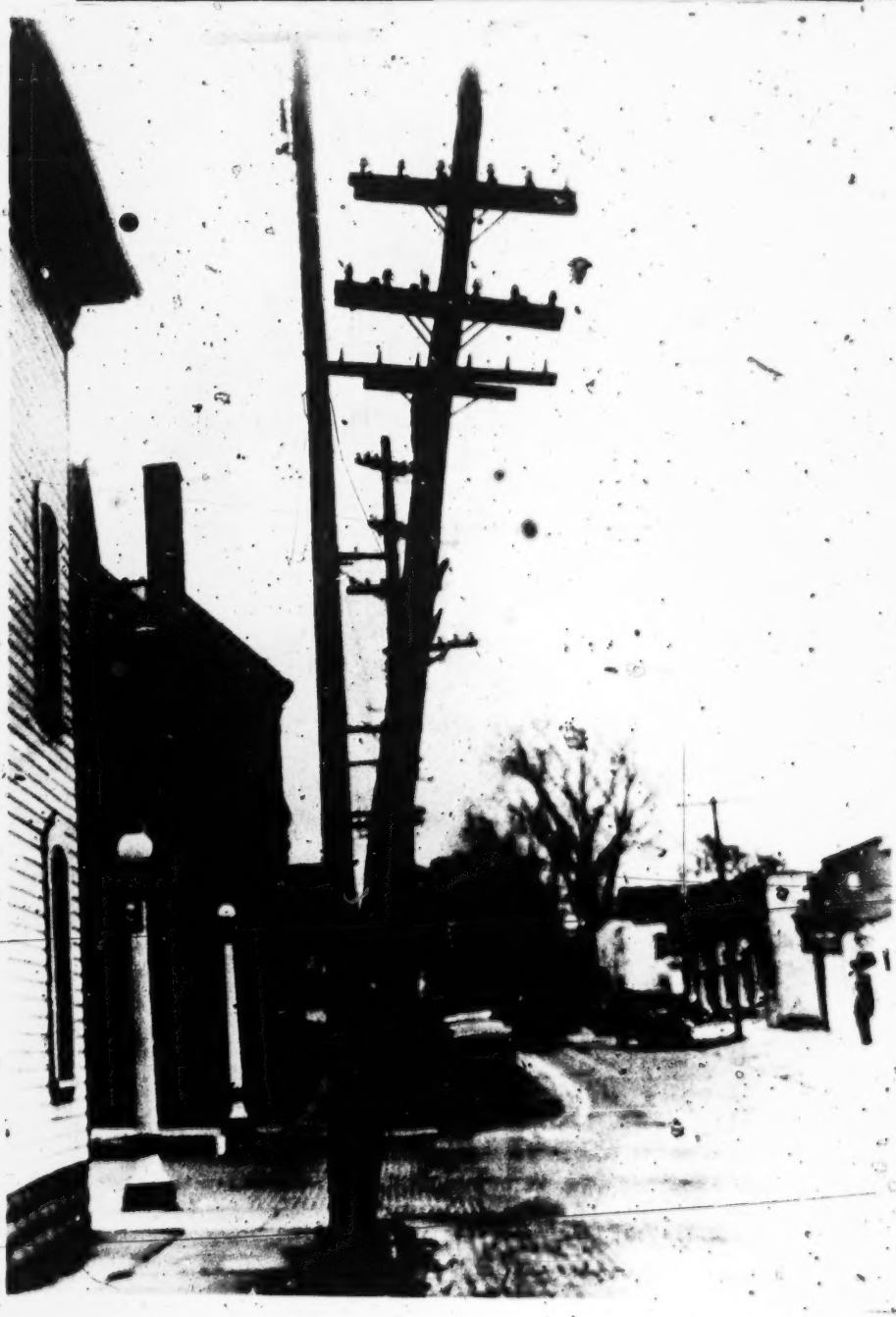


DEFENDANT'S EXHIBIT M

Photograph taken November 11, 1930, showing transformer fixture of the Ohio Electric Power Company on Carey Place to the rear of the Norwalk Foundry Company showing the Ohio Electric Power Company's installation of primary and secondary lines for serving the foundry. The two shorter poles are the poles of the Ohio Electric Power Company. The taller pole in the center is the pole of the electric light system of the City of Norwalk with its primary and secondary

DEFENDANT'S EXHIBIT N

Photograph taken November 11, 1930, showing in the center foreground a pole owned by the Ohio Electric Power Company on West Main Street in the City of Norwalk between the Universalist Church and the telephone company building. The picture shows the 2200-volt primary lines of the Ohio Electric Power Company at a height of about 15 feet above street level.



DEFENDANT'S EXHIBIT O

Photograph taken November 11, 1930, showing in the center foreground a pole owned by the Ohio Electric Power Company on West Seminary Street in the City of Norwalk at the corner of Benedict Avenue. The pole carries 2200-volt primary and secondary lines of wires of the Ohio Electric Power Company. The pole of the Ohio Electric Power Company is leaning over the street. Immediately behind this pole is shown the taller pole of the City of Norwalk Electric Light System.

DEFENDANT'S EXHIBIT P

VALUATION DISTRIBUTION SYSTEM OF OHIO ELECTRIC POWER COMPANY IN THE CITY OF NORWALK

7 pole line miles primary 2200 volt				
13,398 ft. #4 wp	@	.0403	installed	$ 539.94
14,500 ft. #6 "	@	.0282	"	408.90
85,951 ft. #8 "	@	.0194	"	1667.45
8 pole miles of secondary 220/110 volt				
53,000 ft. #8	@	.0194	"	1028.20
5,000 ft. Misc. sizes	@	.0403	"	201.50
400 services	@	4.38	"	1752.00
				$ 5597.99
Transformers power and lighting				
125 trans. totaling 850 kw @ 10.00 per kw				8500.00
Meters power and lighting—installed				
400 meters total 5100 amps @ 1.00 per amp				5100.00
				$13600.00
Line construction distribution only				
410 poles misc sizes averaging 30 ft poles delivered and set @ 8.00				3280.00
Cross arm and secondary racks				1400.00
125 transformer stations less trans. @ 25.00				3125.00
				7805.00
Generating station equipment				
1—150 hp. sterling boiler				8000.00
1—300 hp Corliss engine				8000.00
1—200 kw Allis Chalmers Generator				2000.00
2—G. E. Voltage regulators				800.00
3—100 kw transformers @ 735.00				2205.00
1—Building 100 ftx50 ftx16 ft and				
1—Building 21 ftx6ftx16ft @ .16 per cu. ft.				13022.00
				34027.00
Depreciation				
Wire $5597.99 @ 60%				2239.20
Trans. and meters	$13600.00	@	50%	6800.00
Line construction	$ 7805.00	@	80%	1561.00
Building and equip.	$34027.00	@	80%	6805.40
				17405.60
Land				500.00
Cost of Reproduction New less Depreciation				$17905.60

DEFENDANT'S EXHIBIT Q

Norwalk, Ohio
Reproduction Cost New

Transmission Line	
25 miles of 22,000 volt, 3 phase, line, 35 foot poles, 300 ft. spans, #2 copper, nominal charge for right away (Mr. Insull's substitute line) @ $2,000 per mile	$ 50,000.00
Substation	
3—100 K. V. A. 22000/2300 volt, single phase transformers, lightning arresters, disconnects, fuses, wooden platform, fence, (accepting Mr. Insull's estimate without check)	
2—17¼ K. V. A. voltage regulators, bus bars, insulators, supports installed (accepting Mr. Insull's estimate without check)	5,540.00
Generating Station	
1—200 kilowatt engine generator unit with exciter, switchboard, boiler, stack, in brick building with slate roof	19,250.00
Distribution	
453 customers each requiring on an average; 1 span of primary and secondary, 3 wires each; 1/5 of 5 K. V. A. transformer; 1—3 wire service; 1—10 ampere meter @ $66.71 each (accepting Mr. Insull's estimate which is apparently too high)	30,154.00
Miscellaneous	
1—1-ton Chevrolet, 1—Ford with slip on body, 1—Chevrolet roadster, Office equipment, tools, supplies (accepting Mr. Insull's estimate)	4,800.00
Total reproduction cost new	$109,744.00
Reproduction cost less depreciation	
Transmission Line	
25% of $50,000 (reproduction new)	$ 12,500.00
Substation	
85% of $5,540 (reproduction new) (accepting Mr. Insull's estimate without check)	4,709.00
Generating Station	
Buildings	$1,000.00
Land $1,500	1,500.00

Equipment—Entirely depreciated	0.00	2,500.00
Distribution		
50% of $30,154 (reproduction new).....		15,077.00
Miscellaneous.....		3,525.00
Total Reproduction Cost less Depreciation		38,311.00

DEFENDANT'S EXHIBIT T

(Filed Mar. 13, 1922, B. C. Miller, Clerk U. S. District Court, N. D. O.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity No. 690

General Electric Company,

Complainant,

vs.

The Cleveland, Southwestern and Columbus Railway Company,

Defendant.

PRELIMINARY REPORT OF RECEIVER

To Honorable D. C. Westenhaver, Judge, District Court of the United States, for the Northern District of Ohio, Eastern Division, Cleveland, Ohio.

F. H. Wilson, Receiver, in pursuance of the order appointing the Receiver in this Cause, submits this preliminary report as to the condition of the property of The Cleveland, Southwestern and Columbus Railway Company; also general balance sheet as prepared by Haskins & Sells, Certified Public Accountants.

The Cleveland, Southwestern and Columbus Railway is an Electric Railway 209.6 miles long, all single track with the exception of 6.8 miles of double track in the Cities of West Park and Elyria. There is one Division,

from—West Park to Bucyrus,
Seville to Wooster,
West 105th St. Cleveland to Puritas Springs,

and one from—West 117th St. Cleveland to Norwalk,
Elyria to Grafton,
Elyria to Lorain,
Penfield Junction to Amherst,
Oberlin to Wellington.

It does a passenger and express business over the entire property, and a freight business between Cleveland and Bucyrus, Seville and Wooster, Cleveland and Berlin Heights, including the following intermediate towns: Florence-Birmingham-Wellington-Elyria.

The earnings of the road are being materially affected by motor bus and motor truck competition, which is increasing daily. At present motor buses are operated as follows:

Between Cleveland and Elyria
Cleveland and Fair View
Cleveland and Brunswick
Cleveland and Ridgeville
Elyria and Grafton
Elyria and Oberlin
Mansfield and Bucyrus
Berea and Stop 14, West Park
Seville and Creston
Wooster and Ashland
Polk and Ashland

Motor trucks handle freight between,
Cleveland and Elyria
Mansfield and Bucyrus
Cleveland and Wooster.

The following is a list of franchises under which The Cleveland, Southwestern and Columbus Railway Company is operating as a Railroad; also Power and Light Franchises:

The date of expiration of the franchises as shown thereafter, is the date appearing on the face of the franchises, and is given without prejudice to any rights the Company or the Receiver may or might have after such date in respect thereto.

RAILROAD FRANCHISES

Southern Division

Location	Mileage	Date of Grant	Date of Expiration	Fare	Authority Under Which Granted
West Park—117th St. to Stop 14	5	5-29-1899	5-29-1924	5c	Municipality
West Park—Puritas Springs	4	4-17-1899	4-17-1924	5c	Municipality
Cleveland, City	2	4-17-1899	4-17-1924	5c	County Com.
Cuyahoga County, Stop 14 to Berea	3.7	12-16-1899	12-16-1924	(5c Berea to Stop 21 / 5c Stop 21 to Stop 7)	County Com.
Cuyahoga—Berea to County Line	7	11-24-1900	11-24-1925	3c Mi.	County Com.
Medina County Line to Medina	8.7	12- 3-1900	12- 3-1925	3c Mi.	County Com.
Medina Village	1.9	5-13-1902	5-13-1927	5c	Municipality
Medina County—Medina to Seville	8.9	12-18-1901	12-18-1926	3c Mi.	County Com.
Seville Village (Wooster Div.)	.4	9-27-1902	9-27-1927	5c	Municipality
Medina County—Seville to Creston	1.8	12-18-1901	12-18-1926	3c Mi.	County Com.
Creston Village	.9	10-10-1902	10-10-1927	5c	Municipality
Wayne County—Creston to Wooster	11.6	10- 7-1902	10- 7-1927	3c Mi.	County Com.
Wooster City	1.7	12-30-1901	12-30-1926	5c	Municipality
Seville Village (West)	.5	5- 6-1908	5 -6-1933	5c	Municipality
Medina County to Wayne County Line	)	1- 5-1907	1- 5-1932	3c Mi.	County Com.
Wayne County to West County Line	) 28.6	7- 9-1906	7- 9-1931	3c Mi.	County Com.
Ashland County, East	)	7-21-1906	7-21-1931	3c Mi.	County Com.
Ashland City	2	12- 3-1906	12- 3-1931	5c	Municipality
Ashland County, West	8	7-21-1906	7-21-1931	3c Mi.	County Com.
Richland County—Ashland to Mansfield	4.2	6- 3-1906	6- 3-1931	3c Mi.	County Com.
Mansfield City	2.9	Traffic Agreement with R.P.S.Co.		8c	Municipality
Richland County—Mansfield-Crestline	11.1	4-20-1901	4-20-1926	3c Mi.	County Com.
Crestline Village	1	4- 8-1901	4- 8-1926	5c	Municipality
Crawford County—Crestline to Galion	8.8	3-11-1901	3-11-1926	10c	County Com.
Galion City	1.6	5-10-1901	5-10-1926	5c	Municipality
Crawford County—Galion to Bucyrus	10.1	9-29-1896	Perpetual	(20c St. / 35c RT	County Com.
Bucyrus City	1.2	4- 5-1910	4- 5-1935	5c	Municipality
West Park—Lorain Ave.	3	7-31-1897	7-31-1922	5c	Municipality
Fairview Village—West to Stop 18	3	2- 2-1895	2- 2-1920	5c	Municipality
North Olmsted—Stop 18 to County Line	5.8	10-17-1914	10-17-1939	15c	Municipality
Lorain County to Elyria City Limits	6	8-16-1914	8-16-1939	15c	County Com.
Elyria City	5.6	11- 1-1916	11- 1-1941	5c	Municipality
Lorain County—Elyria to Oberlin	6.3	4- 6-1897	4- 6-1922	3c Mi.	County Com.
Oberlin Village	2.6	2- 3-1915	2- 3-1940	5c	Municipality
Lorain County—Oberlin, West	7	12- 1-1900	12- 1-1925	3c Mi.	County Com.
Erie County to West Line	8	1-30-1901	1-30-1926	3c Mi.	County Com.
Berlin Heights Village	.7	3-27-1901	3-27-1926	5c	Municipality
Huron County	6.5	2- 5-1901	2- 5-1926	3c Mi.	County Com.
Norwalk City	1.5	Traffic Agreement with L.S.E.Co.		5c	Municipality
Lorain County—Elyria to Lorain	4.8	8-25-1899	2-25-1924	3c Mi.	County Com.
Lorain County—Penfield Jct. to Amherst	3.6	6-17-1899	6-17-1924	3c Mi.	County Com.
Amherst Village	.4	5-31-1899	5-31-1924	5c	Municipality
Lorain City	3.75	6- 8-1899	6- 8-1924	5c	Municipality
Lorain County—Elyria-Grafton	5.7	10-30-1900	10-30-1925	3c	County Com.
Grafton Village	.5	2- 7-1901	2- 7-1926	5c	Municipality
Lorain County—Oberlin-Wellington	7.3	3-10-1900	3-10-1925	3c Mi.	County Com.
Wellington Village	.3	11-16-1899	11-16-1924	5c	Municipality

POWER AND LIGHT FRANCHISES

Location	Nature	Date of Grant	Date of Expiration
North Olmsted Village	Street Lighting		
	Domestic and Commercial	10-13-1919	10-13-1929
Dover Village	Street Lighting	6-15-1915	6-15-1925
Dover Village	Domestic and Commercial	6-15-1915	6-15-1940
Rittman Village	Street Lighting	2-18-1914	2-18-1924
Rittman Village	Domestic and Commercial	5- 1-1916	5- 1-1926
Crestline Village	Street Lighting	8-26-1915	8-26-1925
Crestline Village	Domestic and Commercial	8-26-1915	8-26-1940
Creston Village	Street Lighting	11- 7-1921	11- 7-1931
Creston Village	Domestic and Commercial	11- 7-1921	11- 7-1931
Strongville Village	Street Lighting	6-25-1915	6-25-1925
Valley City Village	Street Lighting	12-27-1917	12-27-1927

In addition to above power and light franchises, considerable power and light is furnished rural districts. Gross Earnings, Power and Light—year 1921, $179,477.71

CONDITION OF PROPERTY

Track and bridges in good operating condition.

This season's track maintenance requirements, 60,000 ties, 1½ miles rail, 20 miles ballast.

Five (5) carloads of bridge timbers, in addition to material on hand. This, with the working of bridge gang of ten men until Fall will put all of our bridges in first-class condition.

11,500 rail bonds required to be installed. We have one gang of three men on this work, and expect to start another gang within thirty days. It will take about four months to put the track bonding in good shape.

All buildings and shop equipment in good operating condition.

Car Equipment:

We have 56 Passenger Cars
1 Funeral Car
13 Freight Motor Cars

10 Trailer Box Cars
8 Trailer Flat Cars.
5 Trailer Dump Cars
6 Snow Plows and Sweepers
5 Line Cars
2 Work Cars

Total 106 Cars

The equipment is in good operating condition. Thirty (30) cars should be put through the paint shop this season.

Our passenger cars weigh from twenty-five to thirty-seven tons each, with the result a number of the cars are too heavy for the service required of them on our Branch Lines, resulting in expensive operation, due to excessive consumption of power, maintenance of equipment and maintenance of track.

The purchase of twelve (12) light weight cars of approximately fifteen tons each at a cost of approximately $150,000.00 will result in a saving in operation of $40,000.00 per year. The Engineers of the General Electric and Westinghouse Companies have also made a complete study of our operating conditions, and agree in our estimates as to the saving by the use of light weight cars.

Power House:

Our Elyria Power Plant, at which point we generate all of our current used in operating the railroad, as well as furnishing power and light commercially, has for several years been detrimental to the Company's operation, by reason of obsolete equipment and lack of spare equipment to take care of requirements in case of serious breakdown, or failure of present equipment. In addition the plant is not equipped for economical operation, owing to lack of coal, ash handling, or stoker equipment, also inadequate water supply. A fair percentage of the equipment in the plant is so old that extensive repairs must be made and considerable new equipment purchased immediately if the plant is to continue in operation at low efficiency. A number of the boilers require heavy repairs, and some of the turbine equipment cannot be depended upon for service unless heavy repairs are made. It is estimated it will cost from $475,000 to $500,000 to put the plant in first-class condition, and even then it is felt we will not be able to generate current as cheaply as it can be purchased.

To purchase power it will be necessary for us to change our system from twenty-five to sixty cycle power, the advantages of which are as follows:

Better service to commercial consumers, due to better lighting current and cheaper prices of equipment.

Same frequency as other Power Companies in this territory, making it practicable to sell, buy or exchange power for mutual convenience.

Permit us to bid to much better advantage for new power and light business.

It will cost from $400,000 to $450,000 to change our equipment at sub-stations, install one additional sub-station needed, change motors and other electrical appliances in industrial service (account of changing from twenty-five to sixty cycle power), install automatic switching at three sub-stations and semi-automatic switching at eight sub-stations, which will eliminate labor costs. The installation of this new equipment will also result in a large decrease in our present maintenance costs, due to replacing partially worn-out equipment with new equipment.

It is estimated there will be a saving of from $50,000 to $75,000 per year, not including salvage from the present power plant, to purchase power rather than to generate it ourselves.

The Cleveland Electric Illuminating Company of Cleveland, and the Ohio Public Service Company of Elyria and Mansfield, are both in a position to furnish the required power.

PERSONAL INJURY AND OTHER ACCIDENT CLAIMS

There are sixty-seven (67) law-suits, aggregating $755,657.10, filed against the Company. In addition there are three hundred and thirty (330) other claims, not in suit, covering accidents, including employes, the majority of which are of a minor nature. It is estimated that all of the above claims can be disposed of for not to exceed $90,000.00.

This does not include claims referred to in the General Balance Sheet as prepared by Haskins & Sells, covering settlements which had already been made, and were being taken care of on the monthly payment basis. There are thirteen of these cases, on which $25,875.00 is still due, $15,325.00 having already been paid in partial settlement.

Respectfully submitted,
(Signed) F. H. Wilson, Receiver.

The United States of America,
Northern District of Ohio, ss:

I, F. J. Denzler, Clerk of the District Court of the United States within and for said District, do hereby certify the foregoing to be a true copy of the portion of the preliminary report of Receiver filed in the above-entitled cause in said Court, and that the same is correctly copied from the original now on file in my office.

Witness my official signature, and the seal of said Court at Cleveland, in said District, this 5th day of December, A. D. 1930, and in the 155th year of the Independence of the United States of America.

F. J. Denzler, Clerk,
(Seal) By Ruth Strain, Deputy Clerk.

DEFENDANT'S EXHIBIT U

"Lease, by Frank Lake and Georgia Rexford to The Norwalk Incandescent Light Company, dated September 22, 1890.

"This agreement Witnesseth, that we, Frank Lake and Georgia Rexford hereby lease to The Norwalk Incandescent Light Co. the following described premises, situated in the City of Norwalk, County of Huron and State of Ohio, and being 40 feet off of the East end of Lot 934 situate on the southeast corner of Benedict Avenue and Seminary Street with the privilege of a drive on East end of said lot 934, with the appurtenances thereto, for the term of five years from the 22nd day of Sept. 1890, at a rental of Two Hundred Dollars per annum payable quarterly with the privilege of a revival of said term, providing said premises be not sold during said five yrs. Said Lessee agrees to pay said rent as above stipulated, to not commit or suffer waste, to not use said premises for any unlawful purposes, and at the

expiration of this lease to surrender said premises in as good condition as they now are or may be put, reasonable wear incident to the use for which the same is to be put, excepted. The said Lessors agree to permit said Lessee to erect such building or buildings as may be necessary for the use of an Incandescent Light Plant, excavating and removing all necessary dirt for the construction of proper foundations therefor, and to have the use of any or all buildings thereon, and for such purposes said Lessee shall quietly hold and occupy said premises during said term without any hindrance or molestation by said Lessors, their heirs or any persons lawfully claiming under them.

"It is further mutually agreed between the parties hereto that said Lessee shall have the privilege of purchasing said premises upon such terms and conditions as may be hereafter determined upon between the parties hereto. And in no case shall said premises be sold unless the privilege to purchase said premises upon the proposed terms be first given to said Lessee. And said Lessee shall, within sixty days after due notice of such intended sale, elect to take said premises upon the same terms of said intended sale. Said Lessee reserves the right to remove any and all improvements placed thereon by it, within a reasonable time after expiration of said Lease.

"In witness whereof we hereunto set our hands this 22nd day of September, 1890.

Frank Lake and
Georgia Rexford.
Per John W. Rexford, Agent
Incandescent Light Co.
per Charles Suhr.

Witnesses:
H. S. Mitchell,
F. A. Young.

"State of Ohio, Huron County, ss.

"Personally appeared before me, John Rexford, the duly authorized agent of the Lessors herein, and Charles Suhr, one of the members of said Lessee, and duly authorized to execute the aforegoing instrument, and acknowledged the same to be their free act and deed, for the purposes therein set forth.

Henry D. Mitchell,
(Seal) Notary Public.

"Received October 4, 1890
at 3:35 P.M.
Recorded October 16, 1890.
R. A. Bloomer, Recorder.

"Assignment:—

"The Lessee further agrees to furnish all the wiring and light necessary for the lighting of the residence of Mrs. Lake on Benedict Avenue, but not to exceed 6 16 CP lights, during the continuance of this Lease.
(Lease Record, Vol. 2—page 180.)

"The State of Ohio, Huron County, ss.

"I hereby certify that the above and foregoing is a true and correct copy of the Lease given by Frank Lake and Georgia Rexford to The Norwalk Incandescent Light Co. as the same appears on the records of this office, being recorded in Lease Record Vol. 2, page 180. In Testimony Whereof, I have hereunto set my hand and official seal at Norwalk, Huron County, Ohio, this 11th day of July, A. D. 1927.

Ann Davies Rebhan,
(Recorder's Seal) Recorder.
By Helen Whitbeck, Deputy."

CERTIFICATE OF CLERK

Northern District of Ohio, ss.

I, F. J. Denzler, clerk of the United States District Court within and for said district, do hereby certify that the foregoing printed pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal, in accordance with the praecipe for transcript filed herein, the originals of which remain in my custody as clerk of said court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Toledo, in said district, this 10th day of February, A. D. 1932, and in the 156th year of the Independence of the United States of America.

F. J. Denzler, Clerk,

By K. V. Wilson,
Deputy Clerk.

(Seal)

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PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(January 18, 1933—Before: MOORMAN, HICKS and SIMONS, JJ.)

This cause is argued by G. R. Craig and W. A. Eversman for Appellant and by Geo. D. Welles and E. F. Boxell for Appellee and is submitted to the Court.

DECREE

(Filed March 17, 1933)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the injunction issued herein be set aside and the cause remanded with directions to dismiss the bill.

OPINION

(Filed March 17, 1933)

Before MOORMAN, HICKS and SIMONS, Circuit Judges.

MOORMAN, Circuit Judge: The Ohio Electric Power Company was engaged in furnishing electricity to the residents of the City of Norwalk, Ohio, for heating and lighting purposes. The city passed an ordinance March 23, 1926, directing the power company to remove its poles and wires from the city streets. Upon the refusal of the company to comply with the ordinance, the city caused *quo warranto* proceedings to be instituted against it in the Court of Appeals of Huron County, Ohio. The power company answered alleging a perpetual right to use the streets under grant from the state (Revised Statutes of Ohio, 1880, Secs. 3461, 3471-a), and following the submission of the case on proofs the court entered a decree of ouster. *State, ex rel.*, v. *Ohio Electric Power Co.*, 35 Ohio App. 481. The Supreme Court of the state affirmed (*Ohio Electric Power Co.* v. *State, ex rel.*, 121 O. S. 235); and thereafter this suit was brought by the appellee, as mortgagee of the properties of the power company, to have the ordinance under which the city acted declared void and to enjoin the enforcement of the decree of ouster. Upon the hearing of the case the District Court entered an order enjoining the city, its officers and representatives, and all others to whom notice of the order should come, from taking any steps or action of any kind to cause the enforcement or carrying out of the decree of the state court. From this order the city appeals.

The argument of counsel before us revolves about the source and extent of the right under which the power company entered and has heretofore used the streets. The appellee insists that it was derived from the state,[1] and, being in perpetuity, both the ordinance of the city and the decree of the state court should be enjoined as violating the constitutional provision guaranteeing the sanctity of contract obligations. The city contends that

[1] *Zanesville* v. *T. & T. Co.*, 64 O. S. 67, 80-81; *Farmer* v. *Telephone Co.*, 72 O. S. 526, 531-532; *Telephone Co.* v. *Cincinnati*, 73 O. S. 64, 81; *Lighting Co.* v. *Upper Sandusky*, 93 O. S. 428, 439; affirmed, *Hardin-Wyandot Co.* v. *Upper Sandusky*, 251 U. S. 173.

the grant in the state statute upon which the appellee relies was limited to incorporated companies, and that as the power company is successor in right, title and obligations to a partnership which acquired the right to use the streets under city ordinances which have expired, the right of ouster exists. This view of the city was taken by the Supreme Court of the state in the ouster proceeding. We do not find it necessary to pass upon these questions or to consider in connection therewith, as argued, the scope of the city's powers and the effect of its acquiescence in the use of its streets after the expiration of the city ordinances, for in our opinion the proofs in the case do not justify a federal court sitting in equity in interfering with the decree of the state court.

The District Court undoubtedly had jurisdiction of both the parties and subject-matter of this litigation. The relief sought was of the character that equity alone can grant, and in that sense there was equity jurisdiction. It does not follow, however, that it was within the legitimate scope of the powers of the court to enjoin all persons to whom notice of the order of injunction should come from taking any steps or action of any kind to cause the enforcement of the judgment of ouster in the state court. While it is true that the decree is broad enough in its terms to enjoin the city and its agents from forcibly removing the wires and poles without state warrant, we can not regard it as a whole as having any other effect or purpose than to stay the hand of the state court in carrying out, through its officers or otherwise, its judgment of ouster. Thus defining it, its incidental effect upon the possible unauthorized action of city officials is too negligible to be given consideration in determining its character. Considering it, therefore, as effecting its purpose of staying proceedings in the state court, we inquire into its validity under the authorized practice in equity procedure.

Section 265 of the Judicial Code (28 U. S. C. A., Sec. 379) provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This provision, as said in *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183, was "designed to be in accord with, and not antagonistic to,

our dual system of courts," which means, it seems to us, that except as may be authorized by laws relating to proceedings in bankruptcy, the powers of federal courts to stay proceedings in a state court are no greater than those with which state courts are invested under the rules of the general equity practice. In the opinion in the case just referred to the court points out three classes of cases in which a federal court is not prevented by the code provision, *supra*, from issuing injunctions staying state court proceedings. This proceeding does not fall within any of the classes mentioned. In its objective analysis, it is a suit by a mortgagee to obtain a readjudication of the law and facts adjudicated by a state court of competent jurisdiction in a proceeding to which the mortgagor was a party. There is no claim that an injunction is necessary to protect the jurisdiction of the federal court properly acquired and still subsisting, that the decree of the state court is void for lack of jurisdiction, that the relief here sought should be granted because of fraud or mistake amounting to fraud in the state court proceeding, or that the appellee was denied notice of the state court proceeding and an opportunity to be heard.

In the Wells Fargo Co. case the bill alleged that the express company had not been in anywise "negligent or at fault." Indeed, the express company in that case presented a petition to the state court and asked to be made a party defendant in order to set up the grounds on which it later sought, in the federal court case, to enjoin the enforcement of the judgment. The petition was denied. In *Simon* v. *Southern Railway*, 236 U. S. 115, the basis of the action was that the state judgment was void for lack of sufficient service of process; and in *Public Service Co.* v. *Corboy*, 250 U. S. 153, the ground of the injunction was that the state court was exercising a non-judicial function, and therefore acting beyond its power. *Marshall* v. *Holmes*, 141 U. S. 589, was a proceeding to enjoin the enforcement of a judgment obtained by fraud not discovered until after the judgment was rendered. In *National Surety Co.* v. *State Bank*, 120 Fed. 593, cited with approval in the Wells Fargo Co. case, the judgment resulted from a mistake of a public officer for which the plaintiff suing in equity, not the judgment defendant but obligated to pay the judgment, was in no wise responsible. It appeared in that case

that the judgment had been rendered without opportunity on the part of the plaintiff to put in a meritorious defense, which it had. The court held that the bill presented a new and justiciable case which had not been presented to or decided by the state court. After stating that the plaintiff had a complete defense to the claim upon which the judgment in the state court was based, that it was prevented from availing itself of the defense by an unavoidable accident, that neither it nor any of its agents was guilty of any negligence in not presenting the defense, and that the enforcement of the judgment would result in extortion, it was held that good conscience required that equitable relief be granted. *Louisville Trust Co.* v. *City of Cincinnati,* 76 Fed. 296, 317 (6 C. C. A.), went no further than to enjoin the defendant "from taking into its own hands the enforcement of the decree of the state court." In issuing this injunction the court was careful, however, to point out that it was not proper to enjoin the issuance or execution of any writ under the decree of the state court or to enjoin the defendant from applying for any writ which the state court might lawfully issue, or to prevent the execution of such writ although its execution might be destructive of the interest of the complainant.

It is true that the courts have held that the inhibitions of Section 265 of the Judicial Code do not forbid the issuance of writs of injunction enjoining the enforcement of final judgments of state courts as distinguished from proceedings in such courts. *Simon* v. *Southern Railway, supra; Essanay Film Co.* v. *Kane,* 258 U. S. 358, 360. That provision, however, confers no authority on the court, but is a limitation; and we have been referred to no case holding that a federal court is authorized, under its general equity power, to issue a writ of injunction to stay the enforcement of a judgment of a state court of competent jurisdiction in the absence of a showing that the judgment was void, or that it was based upon fraud or such accident or mistake as made its enforcement unconscionable. In all the cases it seems also to be held that it must be made to appear in connection with one of these conditions that there was also an absence of any fault or negligence of the party seeking the injunction. *National Surety Co.* v. *State Bank, supra; Denton* v. *Baker,* 93 Fed. 46, 49; *Brown* v. *County of Buena Vista,* 95 U. S. 157, 159; *Knox County* v. *Harshman,* 133 U. S. 152, 154; *Marshall* v. *Holmes,* 141 U. S.

589, 596, 600. It would thus seem plain from the authorities that the mere presence of federal and equity jurisdiction is not enough to authorize a federal court of equity to inquire into supposed errors of law in the judgments and decrees of state courts. *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 122, does not hold otherwise. It was there decided that the trust company was not bound by a prior judgment rendered in a suit brought by its mortgagor against the city but was free to attack the ordinance on which the judgment was based. Undoubtedly that was true, as it is in every case where equity grants relief against a final judgment. The question here is not whether the decree of the state court is an adjudication against the appellee, but whether the facts shown justify the granting of the relief sought. Whether there were sufficient facts for that purpose in the Old Colony Trust Co. case does not appear from the opinion. We must assume that there were, otherwise there would be no reason for the emphasis placed on such conditions in the other decisions to which we have referred.

None of the conditions held to be essential to the exercise by a federal court of its power to enjoin the enforcement of a judgment of a state court appears in this case. It is not claimed that the judgment is void or that it was based upon fraud or mistake of fact. The original petition was filed in the state court May 19, 1926. The case did not reach decision in that court until May 21, 1928, and was not decided by the Supreme Court of the state until June 12, 1929. The mortgage was given in 1925, and though the appellee was not made a party to the state suit, it is not alleged or claimed that it did not have knowledge of the proceeding or that it could not have intervened therein, as mortgagee, and asserted the claims that it now makes as the basis of the relief here sought. Error in the state court decree being the sole ground for the relief sought, and the record showing no circumstances justifying interference therewith, the injunction issued herein must be set aside and the cause remanded with directions to dismiss the bill.

Hicks, circuit judge, dissents.

PETITION FOR REHEARING

(Filed April 15, 1933)

IN THE

United States Circuit Court of Appeals

SIXTH CIRCUIT

No. 6126

CITY OF NORWALK, OHIO,
Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,
Plaintiff-Appellee.

Petition for Rehearing

MILBANK, TWEED, HOPE & WEBB,
TRACY, CHAPMAN & WELLES,
Solicitors for Plaintiff-Appellee.

GEORGE D. WELLES,
EARL F. BOXELL,
Of Counsel.

THE WILKINSON-SLOAT PRINTING CO., BRIEF AND RECORD PRINTERS
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IN THE

United States Circuit Court of Appeals

SIXTH CIRCUIT

No. 6126

CITY OF NORWALK, OHIO,
Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,
Plaintiff-Appellee.

PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT:

Now comes plaintiff-appellee in the above entitled cause and presents this, its Petition for Rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

THE DECISION OF THE COURT IS PLACED UPON A POINT HERETOFORE NOT STRESSED AND NOT FULLY BRIEFED OR ARGUED.

The court has ordered the dismissal of Appellee's Bill of Complaint on the ground that any effective in-

junction in this case is within the prohibition of Section 265 of the Judicial Code (U. S. C., Title 28, Section 379). Although one of appellant's assignments of error (No. 24, R. 350) referred to this section, it did not make this claim. Appellant's objection (as shown by its brief, p. 177) was strictly limited to the claim that the injunction violated the statute because it was directed to the state court, which by its terms it was not, as was shown in appellee's brief pages 150-152; and in so far as the injunction was addressed to appellant and its representatives, appellant did not question its propriety. The matter was not mentioned in the supplemental briefs filed by either party and the question was not presented to the trial court by appellant, either by way of answer or brief. The question was not even mentioned in oral argument before this Court.

It is appellant's position that due consideration of all of the authorities construing Section 265 will show that this section does not prohibit the relief granted by the District Court, and for that reason appellee petitions for a rehearing of the cause so that this issue may be fully and completely presented to this Court.

II.

THE DECISION OF THIS COURT APPEARS TO BE BASED UPON A MISCONSCTRUCTION OF THE DECREE OF THE DISTRICT COURT.

The final decree of the District Court enjoins the "* * * City of Norwalk, Ohio, its attorneys, officers, offi-

cials, agents, employes and representatives, and all persons whomsoever to whom notice of this Order shall come, * * *"; among other important things, "* * * from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio * * *", (R. 241, 242) in the quo warranto case. As we read the opinion of this Court (paragraph 3), this Court regards the decree as operating directly upon the Court of Appeals of Huron County and its officers. Possibly this results from the palpably erroneous statement of appellant in its principal brief (p. 177) as to the substance of the decree. Plainly by the language of the decree, it is not directed to the state court. Appellee does not contend and never has contended that this decree operates directly upon the State Court of Appeals. See appellee's principal brief, page 151. Appellee fully recognizes that the decree can have no such application and contends merely that the decree is operative against appellant, its attorneys, officers and representatives. If this Court regards the language used as going beyond this, appellee respectfully submits that the decree can be modified, (as suggested in appellant's brief p. 178) or the case remanded to the district court with instruction to modify the language, so as to remove any doubt as to its extent, which does not require a dismissal of the action, but rather

that thereupon the district court decision shall stand affirmed. No suggestion has ever been made that the injunction in its other important phases operates upon the State Court.

III.

THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT IS NOT PROHIBITED BY JUDICIAL CODE SECTION 265—THE INJUNCTION IS NOT ONE AGAINST PROCEEDINGS IN THE STATE COURT.

Briefly stated, the situation involved is: the quo waranto action was instituted and carried on in the Court of Appeals of Huron County at the instance and expense of the City of Norwalk, with the mortgagor, the Ohio Electric Power Company, being made party defendant. Neither the mortgagee, appellee here, nor any of the bond-holders under the mortgage were made parties to the quo warranto action or served with process or notice of any kind, or represented in that suit, as shown by the bill of complaint herein (R. 13) and admitted by the answer herein (R. 43). The Court of Appeals proceeded to render a decree ousting the mortgagor from the streets and public places of the City of Norwalk. The enforcement of this decree will entirely destroy the value of the property located in the City and consequently wipe out all that portion of appellee's security. In order to prevent this, as well as imminently threatened acts of the City independently of attempts

by the City to make use of the State Court decree, appellee brought its action in the District Court, and after due hearing the District Court enjoined the City, among other things, from taking any steps whatsoever to cause the enforcement of the decree of the Court of Appeals, the injunction running only against the City and its representatives and not against the Court itself.

Appellee submits that upon these facts the District Court was entirely justified in entering the decree enjoining the City, and that its action is not prohibited by Judicial Code, Section 265.

The injunction is not against proceedings in the state court action, but denies to appellant unconscionable use of that judgment and comes after all proceedings in the state court have ended. The Supreme Court has very clearly and definitely held that Section 265 has no application after the termination of the proceedings in the State Court, when the plaintiff seeks only to prevent enforcement of the judgment there involved. *Simon v. Southern Railway*, (1915) 236 U. S. 115:

> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise." (p. 124)

See also

Essanay Film Co. v. Kane, (1922) 258 U. S. 358, at p. 360.

It is entirely true, as stated in the opinion in the Simon case, that these cases do not mean that without more than a showing of federal jurisdiction an injunction may issue. A proper equitable basis must be shown. The point is, that in a proper case the Federal Court may issue its injunction regardless of Section 265. In other words, a federal court has the same power to enjoin the inequitable use of a judgment of a state court as any other state court would have.

Simon v. Southern Railway, supra:

> "But, manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress (Hyde v. Stone, 20 How. 175; Reagan v. Farmers' Trust Co., 154 U. S. 391; Payne v. Hook, 7 Wall. 429)." (P. 123)

Union Ry. Co. v. Illinois Cent. R. Co., (C. C. A. 6, 1913) 207 Fed., 745:

> "We set aside as without merit the contention that the decree complained of violates section 265 of the Judicial Code (formerly section 720 of the Rev. Stat. (U. S. Comp. St. 1901, p. 581)), which forbids, except in the single case there stated, the granting of injunction by any court of the United States to stay proceedings in any court of a state. The decree does not act upon the state court, nor does it in terms forbid action in that court. It

in effect seeks to prevent appellant from obtaining the benefit of a judgment claimed to be inequitable. The existing diversity of citizenship between the parties gave to the federal court precisely the same jurisdiction as vested in a court of equity of the state of Tennessee. In other words, appellee is entitled in the federal courts to the relief obtainable in the state court, but to no greater relief." (p. 747).

The state courts of Ohio, of course, exercise this jurisdiction. See *Anderson v. Anderson,* 8 O. 108, enjoining the enforcement of a foreign judgment; *Wood v. Stanberry,* 21 O. S. 142, enjoining execution under a void judgment; and *Place v. Sweetzer,* 16 O., 142, enjoining enforcement of judgment against property of one not a party to the action.

We respectfully submit that upon the basis of the foregoing authorities, appellee is entitled to the relief given in the district court and that the case of *Louisville Trust Company v. Cincinnati,* (C. C. A. 6-1896) 76 F. 296, upon analysis and when considered with the decisions by this court, discussed infra, does not support the conclusion that the injunction in this case violates Section 265. This court alludes to the language at page 317 of the opinion, which, casually read, might seem to indicate that it is proper to enjoin the defendant only from taking into his own hands the enforcement of the state court decree. However, it must be observed that there the state court had not actually ordered the

removal or destruction of the property in question and the plaintiff was not claiming that the city intended to act to enforce the state court decree, so that it was unnecessary for the court to pass upon the question presented in the instant case. It also appeared that the question involved was not before the court there since the property in question was then in the possession of a federal court receiver. Hence any language to the effect that it would have been improper to have enjoined the City in that case from applying for any writ which the state court might lawfully issue, as being a violation of Section 265, must not be given any greater effect than the actual circumstances then before the court would warrant. Obviously such language would not have been used by this court had the situation been presented to it after a judgment in the state court definitely directing the removal or destruction of the property.

It is also pertinent that this case was decided in 1896, long before the Simon case and other recent decisions of the Supreme Court making it clear that Section 265 has no application in a proper case after the prior case has proceeded to a judgment, the enforcement of which is sought to be enjoined. Hence what was said at page 317 in the opinion of the Louisville case must be regarded as modified and limited by the later decisions of the Supreme Court and this court.

We respectfully submit that as the decision of reversal by this court is rested upon the basis that the injunction violates Section 265, it is clearly in conflict

with the foregoing decisions, and that such position is untenable.

IV.

THIS COURT ERRED IN FINDING THAT THIS CASE LACKS THE CONDITIONS ESSENTIAL TO THE EXERCISE BY A FEDERAL COURT OF ITS POWER TO RESTRAIN THE ENFORCEMENT OF THE STATE COURT JUDGMENT.

This court says that one of the following essential conditions must be present to justify the federal court in restraining enforcement of the state court decree, namely:

1. The necessity of protecting federal court jurisdiction properly acquired and subsisting.

2. The state court decree must be void for lack of jurisdiction.

3. Fraud, mistake or accident.

4. Denial of notice and opportunity to be heard; coupled with a showing that there has been no fault or negligence upon the part of the federal court plaintiff, which is interpreted to mean that the federal court plaintiff must show that it had no knowledge of the state court proceedings until after judgment, or could not have appeared in those proceedings and asserted its defenses.

We respectfully submit that the position of this court overlooks certain vital considerations which render the decision erroneous, viz.:

1. The bases for action by the federal court as recited by this court are not exclusive.

2. This case qualifies under the second and fourth bases or conditions laid down by this court, as stated above—the enforcement of the quo warranto decree will result in the taking of the property of this appellee without due process of law, which is always a ground for injunction by the federal courts against the enforcement of a state court judgment.

3. Want of due process by failure to serve or make appellee a party is not cured by any extra-judicial or casual notice.

4. The cases cited in the court's opinion do not hold that absence of fault or negligence as interpreted by this court must be shown by the federal court plaintiff.

5. In any view of the case appellee is without fault because under the quo warranto statutes it could not have intervened to assert its rights in the quo warranto suit.

6. We submit that the decision of this court in this case is contrary not only to its own prior decisions, but is contrary to the decisions of other circuits and to those of the United States Supreme Court.

We now undertake to demonstrate the vital considerations overlooked by this court.

1.

The Bases for Action by the Federal Court as Recited by This Court Are Not Exclusive.

In *Wells Fargo & Co. v. Taylor,* (1920) 254 U. S. 175, the Supreme Court sets forth three classes of cases in which the federal courts have acted to enjoin inequitable use of state court judgments. The third class, which covers the case at bar, was thus broadly stated:

> "In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the *provision does not • • • prevent them from depriving a party, by means of an injunction of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.*" (p. 183) (Italics ours)

There is nothing in this statement by the Supreme Court limiting relief to the specific classes of cases named by this court in its opinion. In the various cases alluding, for example, to accident, fraud or mistake as a ground for relief, the reasonable interpretation is that the court had no intention of placing a limitation on the power, but that the emphasis on a specific ground of relief in any of the cases is merely for the purpose of showing the particular ground applying to that case coming within the broad proposition quoted above from the Wells-Fargo case. See Michigan Law Review for

June, 1932, Federal Injunction Against Proceedings in State Courts; the Life History of a Statute, by Professor Durfee of the University of Michigan Law School, page 1157, footnote 38, discussing the Simon case.

The authorities discussed subsequently in this Petition demonstrate that no such rigid limitation is applied as would be indicated by the opinion of this court in this case.

2.

This Case Qualifies Under the Second and Fourth Bases or Conditions Laid Down by This Court, as Stated Above—the Enforcement of the Quo Warranto Decree Will Result in the Taking of the Property of This Appellee Without Due Process of Law Which is Always a Ground for Injunction by the Federal Court Against the enforcement of a State Court Judgment.

It is well settled that the enforcement of a void judgment should be restrained regardless of Section 265. This principle has been recognized by this Court, not only in the opinion in this case where it is not applied, but elsewhere. See *Ballard & Ballard Co. v. Munson,* (C. C. A. 6-1928) 25 Fed. (2d), 252, where it was applied. See also *Simon v. Southern Railway,* supra, and *Atchison Ry Co. v. Wells;* (1924) 265 U. S. 101.

Under the opinion of this Court, a distinction must be made in the application of this rule between a case where one is made party to the action, but not served, and the case where a mortgagee having a previously

acquired interest in property is not even made a party to an action affecting that property. This opinion says the judgment against the named but unserved defendant in the first case is void and relief will be given against it, but that the judgment against the mortgagor in the second case where the mortgagee is neither named as a party nor served, is conclusive and binding on the mortgagee. We respectfully submit that no such distinction exists and that the judgment rendered in the latter type of case is to all intents and purposes as void and inconclusive as to the mortgagee not made a party, as the judgment in the first example, and that the enforcement of such a judgment as against such mortgagee constitutes the taking of property without due process of law and is, therefore, an inequitable use of such a judgment, which the federal courts will enjoin the state court plaintiff from making. This point has been made clear by the Supreme Court in at least two decisions.

In *Simon v. Southern Railway*, supra, the court said:

> "For even where there has been process and service, if the court 'finds that the parties have been guilty of fraud in obtaining a judgment* * * it will deprive them of the benefit of it.' McDaniel v. Traylor, 196 U. S. 415, 423. *Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant 'can no more be regarded as a party than any other member of the community.'*" (p. 122) (Italics ours).

Postal Telegraph Cable Co. v. Newport, (Ken., 1918) 247 U. S., 464:

"The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor vs. McVeigh, 93 U. S. 274, 277; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423), *so it cannot without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*" (p. 476) (Italics ours).

And see:

Essanay Film Co. v. Kane, supra:

"But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud *or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of* 1793 *to avoid.*" (p. 360). Italics ours).

These cases govern the present situation. Our case is the Simon case in essence. In the Simon case, Simon's judgment against the railway was void for lack of service of process. Here the quo warranto judgment is void in so far as it affects appellee's property rights for failure to make appellee a party to the action and then give it a day in court. That such is the effect where the mortgagee is not a party was recognized by this Court in *United Sheet & Tin Plate Co. v. Hess*, (C. C. A. 6-1908) 159 Fed., 889:

> "A decree upon either aspect of the case would be fruitless, unless the mortgagees would be thereby concluded. That they would not be, not being parties, is too plain to be discussed, Louisville Trust Company v. Cincinnati, 76 Fed., 296, 22 C. C. A., 334; Keokuk & Western Railroad Company v. Missouri, 152 U. S., 301; 14 Sup. Ct. 592, 38 L. Ed. 450." (P. 892).

It is well settled generally that a mortgagee is entitled to an injunction against the enforcement of any judgment rendered in a case to which he was not a party and which will destroy the value of his security. Specifically see the opinion of this court in the oft cited case of *Louisville Trust Co. v. Cincinnati*, supra, like the instant case in its essential features, where the first thing decided was:

> "There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which

would prevent such easements from passing to a purchaser at foreclosure sale. *It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly impeaching their validity and duration without being made a party thereto.*" (p. 299) (Italics ours).

See also:

Winslow v. Troy Iron & Nail Factory, 1 Disney 229;
Dunham v. Isett, 15 Iowa 285;
Fletcher Cyc. on Corporations (Perm. Ed.) Section 3186;

and it is held generally that the owner of property may restrain the inequitable use of any judgment which will damage or destroy his property.

Arundell v. Phipps, 13 Vesey 95;
Breeden v. Lee, Fed. Cas. 1828;
Cropper v. Coburn, Fed. Cas. 3416.

3.

Want of Due Process by Failure to Serve or Make Appellee a Party is Not Cured by Any Extra-Judicial or Casual Notice.

It has been indicated in the opinion that in order to entitle appellee to relief upon the principle that there must be no fault or negligence on the part of the plain-

tiff seeking an injunction, it must be shown that appellee was without notice of the state court proceeding or could not have intervened therein to protect its rights. We respectfully submit that appellee is not required to make this showing. The courts have uniformly established the rule that due process is not satisfied by any chance extra-judicial notice that may come to one whose rights are being adjudicated in a pending action to which he is not a party served with process.

Coe v. Armour Fertilizer Works, (Fla., 1915) 237 U. S., 413:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court." (pp. 424, 425).

For this proposition see also: *Security Trust Co. v. Lexington,* 203 U. S. 323, 333; *Central of Georgia Ry. v. Wright,* 207 U. S. 127, 128; *Roller v. Holly,* 176 U. S.

398, 409; and *Louisville & Nashville R. R. v. Stock Yards Co.*, 212 U. S. 132, 144, where it was said:

> "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (p. 144).

See also *Rutherford's Case* 72 Pa. St. 82; *Ry. Co. vs. Board of Commissioners*, 247 P. 162 (Mont.)

4.

The Cases Cited in This Court's Opinion Do Not Hold That Absence of Fault or Negligence as Interpreted by This Court Must be Shown by the Federal Court Plaintiff.

This court, in its opinion, has said that appellee is not entitled to relief unless it shows that it was without knowledge of the state court action until after judgment therein or was unable to enter into the state court proceeding and there protect its rights. Nevertheless, upon the point here directly presented it has been explicitly held by this court, by the courts of other circuits, and by the United States Supreme Court, that extra judicial notice of the pendency of the state court action or the existence of opportunity to defend therein does not defeat the right of the party not served to secure the injunctive relief of the federal court, and he who is entitled to assert his rights and protect his interests in federal court because of diverse citizenship or otherwise is not required to go into state court to take this action.

The dominant and classic authority is the case of *Old Colony Trust Co. v. Omaha*, 230 U. S. 100. In view of the fact that this court in its opinion says that the Old Colony case does not hold that the federal court plaintiff can have relief by injunction without a showing of one of the bases recited by this court, such as accident, fraud, etc., and further, because this court assumes that some such basis must have been present in that case, we have been at pains to procure and comb the record in the Old Colony case. In the appendix to this Petition will be found copies of excerpts from the Bill of Complaint of the Trustee and the Answer of the City in that case, in so far as those pleadings have any bearing upon the question here at issue. There is no evidence in the Old Colony record contrary to the allegations of the Bill on this point. The Old Colony case is like the case at bar in every essential characteristic. In that case in the prior suit which was brought by the utility, the mortgagor, against the city in federal court, the city had obtained a final judgment dismissing the bill, which upheld the ordinance the enforcement of which would cut away the rights of the Trustee, which judgment had been affirmed by the Circuit Court of Appeals and the case was pending upon appeal by the utility company to the United States Supreme Court, when the suit was brought by the Trustee for an injunction against the enforcement of the ordinance. Hence the suit was one to enjoin the City from making an unconscionable use of the prior judgment. The trustee's Bill of Complaint

alleged the foregoing facts; that important considerations in support of its rights were not presented in the prior suit; that its mortgagor possessed perpetual rights in the streets; that the Trustee was not a party to the prior cause, and that in the then present state of the litigation it was impossible for it to intervene in the prior cause. The parallel between that case and the instant case will at once appear, and the record in the Old Colony case will be searched in vain for any proof or showing that the Trustee did not at all times know of the pendency of the prior suit, or that it could not have intervened therein before the case reached the stage of final judgment and appeal thereon to the United States Supreme Court, yet the Federal Court granted the Trustee an injunction.

As to the allegation in the Bill that the Trustee could not intervene in the then present state of the litigation when the case was pending on appeal to the United States Supreme Court, obviously the same fact appears in the case at bar, because as shown by the record, the instant suit was brought after the final judgment in the State Court in the prior suit and at a time when the only thing which could have been done by the Mortgagor was to petition for a review by the United States Supreme Court. In the Old Colony case the same contention was made by the City as the City of Norwalk makes here, namely, that every consideration which was before the court in the second suit had been presented in the prior suit. Upon that state of facts the holding

of the United States Supreme Court was set forth in the following language at page 122 of the opinion:

> "A prior suit by the Electric Company against the City, largely but not entirely like the present, resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296."

If it be suggested that the principle invoked by this court in the instant case was not brought to the attention of the court in the Old Colony case, the record there shows otherwise. The defendant, City of Omaha, not just once, but at least nine times in the course of the taking of the testimony raised the point invoked by this court in the instant case in the following or equivalent language, which we quote from the Old Colony case record.

> "Mr. Lambert: The respondent objects to any testimony in this cause for the reason that the issues involved in the case of Old Colony Trust Company vs. The City of Omaha, and the ques-

tions therein involved, have been heretofore definitely adjudicated in favor of the respondent and have been set at rest in the case of the Omaha Electric Light & Power Company vs. The City of Omaha, heretofore tried in the Circuit Court of the United States for the District of Nebraska, and in the same cause appealed to the Circuit Court of Appeals of the Eighth Judicial Circuit, this complainant sustaining a relation of privy to the said Omaha Electric Light & Power Company, and, therefore, bound by the adjudication in said cause.

Second: Because at the time the said cause was pending in the Circuit Court of the United States for the District of Nebraska, and also in the Eighth Judicial Circuit Court of Appeals, complainant in the instant case was fully advised of the issues and questions involved in said litigation, and had failed to appear, or make such appearance therein, and for that reason it is estopped at this time, and in this action, from relitigating questions determined in said cause." (p. 421).

Nor can it be said that the point was not called to the attention of the U. S. Supreme Court. We quote from the brief of the Appellee, City of Omaha, before the Supreme Court:

> "If the appellant herein desired to be in a position to question the reasons which the Circuit Court of Appeals may have given for its affirmance of the decision of the lower court, it should have become a party to that litigation, having had abundant opportunity so to do." (p. 11)

Unquestionably, therefore, the decision in the Old Colony case is a direct adjudication, which we submit is binding upon this court, to the effect that this appellee was not bound to make a showing either, (a) that it did not have notice of the prior suit or could not have intervened therein, or (b) that there was accident, fraud, mistake, or any of the other bases recited by this court as a ground for the injunction, but that it was necessary only for appellee to show, exactly as we contend, that there was a prior judgment in the state court action rendered against its mortgagor in which appellee was not made a party or served.

In *Atchison Ry. Co. v. Wells,* supra, where Wells, a Colorado citizen, had sued the Santa Fe in Texas, had secured a writ of garnishment to a Texas Ry. Company, but was not able to make personal service upon the Santa Fe in Texas, and the Santa Fe received notice by personal service on one of its officers in Kansas of the Texas suit in time to have appeared therein, it was contended that the federal court plaintiff should have entered into the state court action and there asserted its rights. The Supreme Court held the injunction restraining the enforcement of the judgment as being void, was proper, and said:

> "The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (pp. 103, 104)

In *Hyde v. Stone*, (1857) 20 How. 170, the court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the courts of the United States, and the forms of proceedings in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." (p. 175)

See also

Smyth v. Ames, 169 U. S. 466, 516.

In the *Essanay Film Co. case*, supra, the court pointed out that the party whose rights are affected by the state court decree has three different remedies:

> "Besides a challenge of the jurisdiction of the state court for want of due process over defendant in personam, to be interposed in that court, and, if overruled, followed by invoking the revisory jurisdiction of this court, *the final judgment may be questioned collaterally, if in truth there be a want of due process, either defensively,*

as in Pennoyer v. Neff, 95 U. S. 714, 723-733; see also, York v. Texas, 137 U. S. 15, 20-21; Western Indemnity Co. v. Rupp, 235 U. S. 261, 273; Baker v. Baker, Eccles & Co., 242 U. S. 394, 401-403; or *by adopting the more aggressive method pursued in Simon v. Southern Ry. Co.,* supra; see also Wells Fargo & Co. v. Taylor, 254 U. S. 175, 183-185. In short, observance by the federal courts, towards litigants in the state courts, of the comity prescribed by § 265, requires orderly procedure but involves no impairment of the substance of constitutional right.'" (pp. 361, 362) (Italics ours).

Western Union Telegraph Co. v. Tompa, (C. C. A. 2-1931), 51 Fed. (2d), 1032, was a suit by the Telegraph Company to enjoin Tompa from prosecuting an action in the New York Supreme Court against the New York Central Railroad Co., Tompa having been injured on a railroad car while working for the Telegraph Company on premises of the New York Central Railroad Company, and the Telegraph Company having an agreement to indemnify the Railroad against any claims on account of such injuries, and Tompa having agreed with the Telegraph Company not to sue the Railroad Company on account of any such injuries, but to look to the relief plan of the Telegraph Company or Workmen's Compensation. *The Telegraph Company had notice of the pending suit in the state court.* Though the federal court refused to issue an injunction against the proceedings

in the state court, it did enjoin the plaintiff therein from enforcing any judgment she might obtain. As against the contention that the Telegraph Company should have asserted its rights in the state court, the Circuit Court of Appeals of the Second Circuit said:

> "The prosecution of the defendant's pending suit is in violation of her agreement with the plaintiff, and the plaintiff has no adequate remedy at law. *Even if we assume that the plaintiff has a remedy in an independent action in equity in the state court or, without deciding, by petition to intervene in the now pending suit, such a remedy does not deprive it of the right to seek redress in this action, curtail the power or do away with the duty of a federal court to grant relief within the limits, and to the full extent, of its own jurisdiction.* Simon v. Southern Railway Co., supra; Hyde & Oglesby v. Stone, 20 How. 175, 15 L. Ed. 874." (p. 1034) (Italics ours)

Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, (C. C. A. 4-1922) 282 Fed. 811, certiorari denied 260 U. S. 749, referred to by the Supreme Court in the *Atchison case*, supra, involved a situation directly analagous to the one now under consideration. The Ohio Firestone Company entered into a contract with a South Carolina company, which filed suit for a breach of contract against the Ohio Corporation in a South Carolina State Court and service was made upon an agent of the West Virginia Firestone Company. A default judgment

was entered and action taken to collect the judgment by attachment of accounts belonging to the West Virginia Firestone Company. Both companies brought an action in Federal Court to enjoin the enforcement of this judgment, although they still had an opportunity to obtain relief in the state court. In that case enforcement of the state court judgment was restrained, although it affirmatively appeared that it was still possible for the federal court plaintiffs to set up their rights and seek relief in the state court. In granting the relief, the court said:

> "It follows, therefore, that upon the record now before us we have to decide whether a corporation against whom a void final judgment has been obtained may, where the necessary jurisdictional facts exist, have the enforcement of the same restrained, *and also whether another corporation, whose property is sought to be taken either upon the mistaken theory that a final judgment has been obtained against it, or that by reason of its relationship to another corporation against whom the judgment was obtained,* may, where jurisdictional facts exist, obtain the aid of a federal court to restrain and enjoin, in a proper case, persons so acting from taking its property in satisfaction of such judgment.
>
> "We think both questiosn should be answered in the affirmative. *This was also the conclusion at which the lower court arrived, and its refusal to exercise the authority was solely upon the ground that the state court wherein the judgment*

was obtained might, at any time within a year from the recovery of the judgment, or, where the judgment was attacked on equitable grounds, at any time after a year, grant complete relief. This, we think, was error, for, even though it be conceded that complainants, or either or both of them, might have appeared by petition in the court in which the judgment was obtained and applied to have the judgment set aside upon grounds similar to those contained in the bill filed in the federal court, they were not confined to this relief alone. The necessary diversity of citizenship, and the amount involved, gave them their right to ask relief in the proper federal court, and a federal court, in the exercise of its equity power, may, and should in a proper case, enjoin the collection of a judgment fraudulently or *unlawfully* obtained in a state court." (p. 814) (Italics ours).

The same situation arose in *Ballard & Ballard Company v. Munson Steamship Line,* supra, decided by this court in 1928. Judgment was obtained by default in a state court of Kentucky against the Steamship Line. It was void because the Steamship Line was not doing business in Kentucky and the agents served were not its agents. The Steamship Line learned of the default eleven days after it was taken and under Kentucky law the judgment did not become final for forty-nine days thereafter. Although the Steamship Line made no attempt to go into the state court action and assert its rights,

this court affirmed the issuance of an injunction restraining the state court plaintiff from enforcing the judgment.

We now come to the cases cited by this court for the proposition that appellee is barred from injunctive relief because it has not shown that it did not have notice of the quo warranto suit in time to have appeared therein or could not have intervened therein.

Expressions will be found in these cases to the effect that the party seeking the injunction must have been free from fault or negligence, but this is stated generally. Not one of them denies relief on the ground that mere failure to apply for leave to intervene by one not in privity with the defendant, after extra-judicial notice, constitutes negligence barring relief in equity.

In *National Surety Company v. State Bank,* (C. C. A. 8-1903) 120 Fed. 593, injunctive relief was granted upon the ground of unavoidable accident because the plaintiff (state court defendant), a Missouri corporation, did not get actual notice of process served upon a state officer in Nebraska designated as agent for service of process. The adjudication was, of course, proper under these circumstances, but obviously it was not necessary to the decision to lay down any rule such as this court applies against the appellee in the instant case.

In *Denton v. Baker,* (C. C. A. 9-1899) 93 Fed. 46, the decree of the District Court granting injunctive relief and declaring void a state court judgment against

an insolvent bank was reversed. It there appeared that the receiver of the bank had learned of the judgment a few days after its rendition, but it also affirmatively appeared that the receiver had a definite means for getting rid of that judgment under the state statutes, and that he was guilty of long unsatisfactorily explained delay, amounting to laches, after which he applied to the state court which had rendered the judgment to vacate the same, which was denied, and that on his appeal to the state supreme court the order denying the application to vacate the judgment was affirmed, and hence the federal court would not interfere in his behalf. It is obvious that the receiver was in privity with the insolvent bank, as the language of the state supreme court decision clearly pointed out, and so the federal court rightly determined that the receiver was concluded by the result in the state courts.

In *Brown v. County of Buena Vista,* (1877) 95 U. S. 157, there was a Bill by the County in federal court for relief by injunction against the holder of a judgment procured in a federal court against the County upon county warrants brought on the ground of fraudulent conspiracy in the issuance of the warrants and the securing of payments on the judgment. Relief was denied, not on the ground invoked in the instant case against this appellee, but because it there appeared the federal court plaintiff had been served in the prior case, that its allegations of fraud and conspiracy were not proved, and that it was guilty of laches.

In *Knox County v. Harshman,* (1890) 133 U. S. 152, there was a Bill brought by the County in federal court for injunction against prosecution of a writ of mandamus out of the same court to compel a tax levy for the payment of a judgment obtained by Harshman in a prior suit in federal court upon county bonds. The bill claimed fraud, but the real grounds were falsity of allegations in the prior petition and that the county had no notice. The ground of the decision denying relief was that the first ground could not be proved and that the service upon the county in the first suit was regular and conformed to the statute.

In *Marshall v. Holmes,* (1891) 141 U. S. 589, plaintiff brought a Bill in the state court to enjoin execution of a judgment procured by fraud in which it was alleged the fraud was not discovered until after judgment. Plaintiff got a temporary injunction in the state court and afterward sought to remove the case to the federal court. The removal order was denied by the state court, whereupon the case proceeded to judgment in the state court with the result that the injunction was dissolved and the defendant authorized to execute the prior judgment. The case came before the United States Supreme Court on error to review the order denying removal. The Supreme Court's decree of reversal was, therefore, based upon the proposition that the order denying removal was erroneous, and while the petition did allege that the fraud was not discovered until after judgment, no rule was laid down requiring that the plaintiff must

show that she did not have notice of the prior suit or could not assert her rights therein.

5.

In Any View of the Case, Appellee is Without Fault Because Under the Quo Warranto Statutes it Could Not Have Intervened to Assert its Rights in the Quo Warranto Suit.

At all events, even if the view as interpreted by this court that appellee was bound to make a showing of no fault or negligence is accepted, we submit that the record in the case as it stands satisfies the requirement.

The judgment in the state court proceedings was in quo warranto. The procedure in quo warranto actions is regulated strictly by statute (General Code of Ohio Section 12303-12344), and it is a special type of proceeding by force of statute only. *State Ex Rel v. Columbus Del. & M. Elec. Co.,* (1922) 104 O. S. 120. The sections of the Code governing the procedure in quo warranto are exclusive and the other general sections of the code with reference to actions and proceedings have no application. The quo warranto sections make no provisions by which the appellee could have intervened in the quo warranto suit to obtain any relief therein.

That appellee could not have intervened therein as a matter of right, see *Toledo Traction Light & Power Co. v. Smith,* (1913 District Court, Northern District of Ohio) 205 Fed. 643, 662, where it is said by Judge Killits:

> "We are now to that argument which asserts want of jurisdiction in this court, because a remedy at law, as quo warranto, exists to test the title of plaintiff's directors to the seats they claim. In the first place, the statutes of Ohio do not award an action in quo warranto as a matter of right on demand of a party claiming an interest, but devolve upon either the Governor, Supreme Court, General Assembly, Attorney General, or prosecuting attorney the initiative for such an action when title to a private office is in question. Sections 12,305, 12,306, and 12,307, General Code. It would seem to us that the remedy by quo warranto is therefore not quite complete, where the party interested must appeal to the discretion of some other person or body." (p. 662).

Concededly, if appellee had no standing to go into the quo warranto suit other than a questionable right to appeal to the discretion of the state court (on this point see *Coe v. Armour Fertilizer Works,* supra,) the instant case is not only brought squarely within the rule of the Wells-Fargo and other cases relied upon by this court, but is likewise brought squarely within the proposition enunciated by this very court when it says there must be a showing either that appellee had no notice of the state court proceeding or could not have asserted its right therein.

Moreover, the record affirmatively shows that if there was negligence upon anyone's part, it was upon the part of the City. The supplemental mortgage was

filed for record in the Recorder's Office on June 19, 1925, which was prior to the passage of the ordinance directing the filing of the quo warranto proceedings. Thus, the City knew that the Trustee under the mortgage had a claim to the franchise of the Ohio Electric Power Company, if one existed. *Section* 12310 *Ohio General Code* provides:

> "All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise."

As the City saw fit to ignore the rights of the Trustee under the mortgage in the quo warranto proceedings, we submit it is not right that the Trustee under the mortgage residing in a distant state should be presumed nevertheless to have learned of the City's action against the Power Company, and now be held to have lost its rights as a result of the proceedings in the quo warranto case. This, we submit, amounts to saying that the City by deliberately omitting to include the Trustee under the mortgage in the quo warranto case, nevertheless obtained the same rights against the Trustee as though the Trustee had been included in those proceedings and had had its day in court therein. This, we submit, cannot properly be held, and we further submit that under such circumstances the burden is not upon the Trustee to allege and prove that it had no knowledge of the pendency of the action against the Power Company. If

this point is to be considered at all, we submit it was the duty of the defendant City in the pending suit in equity to allege and prove that the Trustee under the mortgage had full notice of the proceedings in quo warranto in time to have intervened, and that the City was itself negligent in not making the Trustee a party to the quo warranto proceedings. As we have shown, even if the City had so alleged and proved, this would still under the authorities hereinbefore cited not have afforded the City any defense against the Power Company's rights in equity. But even if these authorities are not to be followed, we nevertheless submit that on the record in this case the Trustee under the mortgage cannot be held to have been at fault.

6.

We Submit That the Decision of This Court in This Case is Contrary Not Only to its Own Prior Decisions, But is Contrary to the Decisions of Other Circuits and to Those of the United States Supreme Court.

What we have said above has already demonstrated this proposition.

For the proposition that the decision of this court in this case conflicts with its own prior decisions see: *Louisville Trust Company v. Cincinnati,* supra; *Ballard & Ballard Co. v. Munson,* supra; *United Sheet & Tin Plate Co. v. Hess,* supra. That it conflicts with the decisions of the courts of other circuits see: *Firestone Tire*

& Rubber Co. v. Marlboro Cotton Mills, supra; *Western Union Telegraph Company v. Tompa,* supra, and that it conflicts with the decisions of the United States Supreme Court, see *Old Colony Trust Co. v. Omaha,* supra; *Atchison Ry. Co. v. Wells,* supra; *Coe v. Armour Fertilizer Works,* supra; *Simon v. Southern Ry. Co.* supra, and *Wells-Fargo & Co. v. Taylor,* supra.

V.

IN THE ALTERNATIVE APPELLEE ASKS THAT THE CASE BE REMANDED WITHOUT DECISION TO PERMIT THE TAKING OF FURTHER TESTIMONY.

Appellee respectfully reiterates its position, as stated above, that upon the record and the authorities this petition for rehearing should be granted.

Without receding from that position, however, appellee submtis that if the view of this court upon consideration of this petition be otherwise, the case should not be remanded with instructions to dismiss the bill, but in the interests of justice, should be remanded with instructions to receive evidence from both parties on the question as to whether appellee has been guilty of any negligence barring relief in equity. The decision of this court as we read it seems to go upon the basis that on the present record, it may properly be presumed that appellee had knowledge of the pendency of the quo warranto proceedings in time to have asked and obtained as a matter of right leave to intervene, and that appellee

was negligent in not intervening and asserting its rights in the quo warranto suit. We believe we have shown that it is not correct to say that the appellee had any right to intervene in the quo warranto suit, and we believe we have shown that it would not have been guilty of negligence in not attempting to intervene, even if it had had knowledge of the pendency of the quo warranto proceedings. In view of the fact, however, that there is no suggestion either in the pleadings or the evidence that the appellee had any knowledge of the quo warranto proceedings prior to the entry of the final judgment in the Supreme Court of Ohio, we respectfully submit that if the court adheres to the decision that such knowledge would constitute negligence, then the only way the true rights of the parties can be ascertained is to require the evidence to be taken on this subject. In order to demonstrate that this will not be a futile proceeding and that if the point had been made in the court below, such evidence could have been produced and that it still can be produced, we have secured affidavits from all of the various officers and counsel of the appellee (trustee), who were in charge of the mortgage trust in its behalf, and copies of these affidavits are included in Appendix B to this petition for rehearing. They show that appellee had no notice of the quo warranto action until the summer of 1929, subsequent to the Supreme Court decision on June 12, 1929.

We recognize that this matter lies within the discretion of the court, but respectfully submit that under all

of the circumstances the suggested procedure is in the interest of justice, and that it is entirely in line with the practice of this court and other Federal Courts. *Columbus Gas & Fuel Co. v. Columbus,* (C. C. A. 6) 55 F. (2) 56; *Panama Mail S. S. Co. v. Vargas,* 281 U. S. 670; *U. S. v. Rio Grande Irrigation Co.,* 184 U. S. 416, *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins,* 176 U. S. 167; *Wilson v. Spencer,* (C. C. A. 5) 261 F. 357; *Lee v. State Bank & Trust Co.,* (C. C. A. 2) 38 F. (2) 45.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted, and that the decree of the District Court be, upon further consideration, affirmed.

Respectfully submitted,
MILBANK, TWEED, HOPE & WEBB,
TRACY, CHAPMAN & WELLES,
Solicitors for Plaintiff-Appellee.

GEORGE D. WELLES,
EARL F. BOXELL,
Of Counsel.

CERTIFICATE OF COUNSEL

I, George D. Welles, of counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

GEORGE D. WELLES.

APPENDIX A

EXCERPTS FROM PLEADINGS IN CASE OF OLD COLONY TRUST COMPANY VS. CITY OF OMAHA

Excerpt from Bill of Complaint of Old Colony Trust Company in the case of *Old Colony Trust Company vs. City of Omaha* reviewed by the United States Supreme Court in 230 U. S. 100.

"Your orator further avers, that on the 29th day of June, 1908, the said Omaha Electric Light & Power Company filed and presented to the Circuit Court of the United States within and for the District of Nebraska, Omaha Division, its bill in equity praying that the City of Omaha, its officers and representatives be enjoined and restrained from enforcing the provisions of the said resolution directing the cutting of the wires aforesaid, a copy of which said bill of complaint is hereto attached and marked Exhibit 'Q' and made a part hereof; that upon the filing of the said bill, a temporary restraining order was issued as prayed in said bill by said court; that thereafter, an answer was filed in said cause, and replication filed thereto; testimony taken and the cause was submitted to the said court; upon consideration whereof, the said court entered a decree in said cause dismissing the said bill for want of equity, upon the

ground that the said Omaha Electric Light & Power Company had no lawful right to use the streets and alleys and public places of the City of Omaha for the purpose of transmitting electricity to be used for power purposes. Thereupon, an appeal was duly prosecuted from said decree to the United States Circuit Court of Appeals for the Eighth Circuit; and the same came duly on to be heard and was submitted to said court; on consideration whereof, said court entered a decree affirming the decree of the Circuit Court aforesaid, upon the ground that the said Omaha Electric Light & Power Company had no lawful right to use the streets, alleys and public places of the City of Omaha for transmitting electricity for any purpose. Thereupon, an appeal was duly prosecuted from said decree of the said Circuit Court of Appeals to the Supreme Court of the United States, which said last mentioned appeal is still pending and undetermined in said court. Your orator further avers that in said bill and in the testimony offered in support thereof, important facts essential to the proper determination of the rights which your orator as trustee as aforesaid acquired from said Omaha Electric Light and Power Company and still possesses as herein shown to the use of the streets, alleys and public places of the City of Omaha, were not set forth or brought to the attention of the Court; that your orator was not a party to said cause and did not directly or indirectly participate in the prosecution thereof; that in the present state of the said litigation it is impossible for your orator to inter-

vene in said cause, or to bring to the attention and knowledge of the court, the facts aforesaid omitted from said last mentioned bill and testimony. And your orator avers that it is necessary for it, in order to protect the rights of the parties whom it represents as herein set forth, to institute and prosecute this, its separate action." (p. 24)

Excerpts from the answer of the City of Omaha to the Bill of Complaint of Old Colony Trust Company in the case of *Old Colony Trust Company vs. City of Omaha* reviewed by the United States Supreme Court in 230 U. S. 100.

"Further answering said bill and more particularly the averments of the 42nd paragraph, defendant admits that on June 29, 1908, said power company presented to this court in this division, a bill in equity against this defendant and its officers, seeking to enjoin the defendant and its officers from enforcing the provisions of said resolution; admits that Exhibit 'Q' is a copy of the complaint filed in said cause; admits that a restraining order was issued as prayed, and that issues were made, tried and submitted, and that this court upon consideration thereof dismissed the bill of said power company for the want of equity, holding that it had no lawful right to use the streets and public places of defendant for the purpose of generating and supplying current in the production of power and heat. Admits that thereafter an appeal was taken of said cause to

the Circuit Court of Appeals for the Eighth District, and that the same was duly presented to that court, and that said court of appeals affirmed the decree of this court upon the ground that said power company had no lawful right to use the streets and public places of defendant in the transmission of electricity for any purpose; admits that an appeal was attempted to be prosecuted from the decision of said Circuit Court to the Supreme Court of the United States, and that such attempted appeal remains undisposed of in that court. Defendant denies that important facts essential to the proper determination of any rights which complainant has as trustee, were not set forth in the pleadings or developed in the trial or considered by the Court in arriving at its judgment. Admits that complainant was not a party in said action and did not participate, so far as defendant knows, in the prosecution of said action. In relation to the averments of said paragraph of said bill, defendant says that all the rights which said power company possessed and all the grounds and reasons which may be urged or claimed in respect to said power company's rights or the rights of complainant to use the streets, alleys and public places in perpetuity or otherwise, were brought forward or urged in said cause; that all such matters were before this court and before the Circuit Court of Appeals, in the appellate proceedings, and every ground and every reason urged by the complainant in this cause were urged upon the attention of the court in said cause, but this court held there upon consideration of the claims of said power

company, that it was not entitled under and by virtue of Ordinance No. 826, to generate and distribute electrical current for other than lighting purposes, and that no act of this defendant or its officials had enlarged the powers and grants under said ordinance or had estopped this defendant from interfering with the continued use of its streets by said company for said purposes. That the Circuit Court of Appeals affirmed the decree of this court, and upon the issues presented, which were the same as the issues presented by this bill, held and decided that the rights which had been given by Ordinance No. 826 had expired by limitation of time, and that said power company was occupying the streets and public places of defendant for the purpose of distributing current for any and all purposes at sufferance, and that said Ordinance No. 826 did not grant to the grantors of said power company and its assigns, the perpetual right to occupy the streets and public places of defendant for the purpose of distributing current for any purpose, and that the officials of defendant were without power and authority to grant to said power company or to any other company or person, a perpetual right to occupy its streets and public places for said purpose; that the judgments and decrees aforesaid have not been reversed or modified and that thereunder said power company is now and ever since the expiration of said Ordinance No. 826 has occupied the streets and public places of defendant at sufferance and at will. That said judgments, orders and decrees are binding precedents upon the rights of

said power company and the rights of complainant company to use the streets and public places of defendant for the purpose of distributing current under said Ordinance No. 826 or otherwise, and announce the law and are binding precedents as to the right, power and authority of the officers of defendant in 1884 to grant to said power company or any other company or person the right, perpetually, to use its streets for said purposes. That said decisions became and are res adjudicata as to all the questions decided in said cause and as to all questions which might have been raised and decided in said cause, and that thereby and on account of said judgments, decrees and orders and the rules of law in relation to said matters therein announced, complainant is estopped from relitigating and retrying the questions tried in said cause or which might have been presented and tried in said cause.

"For its further answer and defense to said bill, this defendant avers that whatever rights which said complainant company may represent or be entitled to assert as between it and said power company, and whatever rights those whom the complainant company may represent, may have as between themselves and said power company because of their respective relations as trustee or as holder of the mortgage and bonds of said power company, yet the same and all the same give to said complainant company and those whom it represents, no rights or claims as to defendant, superior or greater than those of said power company, and that the rules of law, insofar

as it is concerned, and the decisions of the court which are effective and binding on said power company, are equally effective and binding upon complainant company, and that every question relating to the use of the streets and public places of defendant which has been adjudicated in its favor and against said power company, bind with equal force and effectiveness complainant company and those whom it represents, and that complainant company is not entitled again to litigate the questions relating to the rights of said power company to use the streets and alleys of defendant under its claims of authority by said Ordinance No. 826 or the acts of the party in relation to powers granted or supposed to be granted thereby. That complainant in this cause is not seeking to enjoin defendant from interfering with its operation of the plant in question or the operation thereof by those whom it represents, but on the contrary is seeking to interfere with defendant's proceeding against the right of said power company longer to use its streets and public places for said purposes, which claims and asserted rights so to do have all been adjudicated by the judgment and decree of this court and the judgment and decree of said appellate court in favor of this defendant and against said power company." (pp. 139, 140, 141).

APPENDIX B

AFFIDAVITS

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

DONALD MACKENZIE, being duly sworn, deposes and says:

1. That on or about June 18, 1929, the Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, up to January 1, 1926, he was associated with the firm of Masten & Nichols and that from January 1, 1926, to and after September 16, 1929, he was a member of the firm of Masten & Nichols.

3. That said firm was counsel for said Seaboard National Bank or said Seaboard Bank as trustee under the Ohio Electric Power Company Mortgage dated July 1, 1924.

4. That, except for a period of approximately two months commencing August 8, 1924, all matters connected with the administration of said mortgage referred by said trustee to Masten & Nichols were attended to personally by or were disposed of under the supervision of the deponent.

5. That the deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio, prior to July 1, 1929.

6. That deponent's first knowledge of any such proceeding was obtained from conversations in the latter part of March, 1933.

(Signed) Donald Mackenzie.

Sworn to and subscribed before me
this 3d day of April, 1933.
(Signed) Pearl E. Loeber,
Notary Public, Kings County.
(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF CONNECTICUT, COUNTY OF FAIRFIELD, ss:

CHARLES D. MAKEPEACE, being duly sworn, deposes and says:

1. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, until September 16, 1929, he was a Vice-President of said Seaboard National Bank or of said Seaboard Bank in charge of the branch at which the Ohio Electric Power Company had its account and transacted its business with the Bank.

3. That deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio, until inquiry in the matter was made of him by Mr. Charles L. Clune on or about March 29, 1933.

(Signed) Charles D. Makepeace.

Sworn to and subscribed before me
this 7th day of April, 1933.

(Signed) Percy E. Cantrell,
Notary Public.

(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

VS.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, SS:

CHARLES L. CLUNE, being duly sworn, deposes and says:

1. That he is a Second Vice-President of The Chase National Bank of the City of New York, successor by merger to The Equitable Trust Company of New York (hereinafter called the Equitable Trust Company) as trustee under the Ohio Electric Power Company Mortgage dated July 1, 1924.

2. That said mortgage was executed to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank) as trustee on September 2, 1924.

3. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereafter called the Seaboard Bank) became the successor to said Seaboard National Bank as trustee under said mortgage.

4. That on or about September 16, 1929, said Equitable Trust Company became the successor by merger to said Seaboard Bank as trustee under said mortgage.

5. That from the time of the execution of said mortgage by said Seaboard National Bank as trustee as aforesaid until said merger of said Seaboard Bank with said Equitable Trust Company the deponent was an officer of said Seaboard National Bank or of said Seaboard Bank employed in the corporate trust department and charged with the administration of matters connected with said mortgage.

6. That prior to July 1, 1929, the deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the *City of Norwalk, Ohio*.

7. That the deponent's first knowledge of any such proceeding was obtained from conversations during the late summer or autumn of 1929 and in any event not earlier than July 1, 1929.

8. That the first knowledge the deponent ever had of said proceeding was learning that a final judgment had been rendered after appeal in the Ohio State Court and that the question was being considered of the advisability of proceedings in the Federal Court being instituted by the trustee under said mortgage.

9. That the deponent has examined all the files of the corporate trust department of said Seaboard National Bank and said Seaboard Bank which in the opinion of the deponent could contain

any matters relative to the administration of said mortgage or relative to said proceeding and that the earliest instrument in any of said files containing any reference to any such proceeding is a letter dated October 23, 1929, received by the trustee on October 24, 1929.

10. That in the judgment of the deponent the only officers of said Seaboard National Bank or of said Seaboard Bank, in addition to himself, likely to have had knowledge of any matters connected with said mortgage or any of the properties covered thereby or of said Ohio Electric Power Company are the following:

Mr. John A. Burns, the Vice President of said Seaboard National Bank and said Seaboard Bank in charge of the trust department.

Mr. Charles D. Makepeace, the Vice President of said Seaboard National Bank and said Seaboard Bank in charge of the branch at which said Ohio Electric Power Company had its account and transacted its business with the Bank, and

Mr. F. Rogers Parkin, the officer of said Seaboard National Bank and said Seaboard Bank who assisted said Mr. Makepeace in connection with financial transactions of said Ohio Electric Power Company.

(Signed) Charles L. Clune.

Sworn to and subscribed before me
this 3rd day of April, 1933.
(Signed) Charles F. Wright,
Notary Public, New York County.
(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

JOHN A. BURNS, being duly sworn, deposes and says:

1. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, until September 16, 1929, he was a Vice-President of said Seaboard National Bank or of said Seaboard Bank in charge of the trust department.

3. That prior to July 1, 1929, the deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio.

4. That deponent's first knowledge of any such proceeding was obtained from conversations during the late summer or autumn of 1929 and in any event not earlier than said July 1, 1929.

5. That the first knowledge the deponent ever had of said proceeding was learning that a final judgment had been rendered after appeal in the Ohio State Court and that the question was being considered of the advisability of proceedings in the Federal Court being instituted by the trustee under the Ohio Electric Power Company Mortgage dated July 1, 1924.

(Signed) J. A. Burns.

Sworn to and subscribed before me
this 3rd day of April, 1933.
(Signed) Charles F. Wright,
Notary Public, New York County.
(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

VS.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

F. ROGERS PARKIN, being duly sworn, deposes and says:

1. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, until September 16, 1929, he was the officer of said Seaboard National Bank or of said Seaboard Bank who assisted Mr. Charles D. Makepeace in connection with financial transactions of the Ohio Electric Power Company.

3. That deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio, until inquiry in the matter was made of him by Mr. Charles L. Clune on or about March 29, 1933.

(Signed) F. Rogers Parkin.

Sworn to and subscribed before me
this 3rd day of April, 1933.
(Signed) Hugh C. Spence,
Notary Public, Bronx Co., N. Y. County.
(SEAL)

ORDER DENYING PETITION FOR REHEARING

(Filed May 18, 1933)

The petition for rehearing of this cause is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *The City of Norwalk, Ohio* v. *The Equitable Trust Company of New York, N. Y.* No. 6126, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 8th day of June, A. D. 1933.

J. W. MENZIES,

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4194)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TRACY, CHAPMAN & WELLES,
Toledo, Ohio,

MILBANK, TWEED, HOPE & WEBB,
New York, N. Y.,
Solicitors for Petitioner.

THE WILKINSON-GLOAT PRINTING CO., BRIEF AND RECORD PRINTERS
1218-17 JACKSON ST., TOLEDO, O. PHONE MAIN 6762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No.....

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TRACY, CHAPMAN & WELLES,
Toledo, Ohio,

MILBANK, TWEED, HOPE & WEBB,
New York, N. Y.,
Solicitors for Petitioner.

THE WILKINSON-SLOAT PRINTING CO., BRIEF AND RECORD PRINTERS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No.... .....

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Supreme Court of the United States:

The Petition of the Chase National Bank of the City of New York, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

A. Facts and Ultimate Question.

Petitioner is the Trustee under a mortgage given by the Ohio Electric Power Company, an Ohio public utility

corporation, securing $2,600,000.00 of bonds issued by that company. Among the mortgaged properties are franchises owned by the Ohio Electric Power Company to use the streets and public places of the respondent, City of Norwalk, Ohio, for the distribution of electric current for light, heat and power purposes. The rights of petitioner and bondholders represented by it were acquired prior to a suit in quo warranto in the Ohio State Courts at the instance of the respondent City against the mortgagor Power Company, resulting in an ouster decree against the Power Company. Neither Petitioner nor any other representative of the bondholders was a party to the quo warranto case or had any notice of it or opportunity to be heard in it.

The ultimate question is whether Petitioner can and should have a day in court for the determination of its rights as mortgagee of these franchises, and to have its rights in and lien upon the franchises and property of the Ohio Electric Power Company in the City of Norwalk protected against wrongful destruction by the respondent, City of Norwalk.

B. The Judgments Below.

(1) District Court.

The District Court (Judge Hahn) held that the Power Company had a valid and existing franchise, and that Petitioner was entitled to have its interest as mortgagee thereof protected by an injunction restraining the respondent City from interfering by force (theretofore actually used and

further threatened) with the exercise by the Power Company of its franchise rights, and also restraining the respondent City from taking any steps to procure the enforcement of the judgment of ouster, which the City (in the name of the State of Ohio) had obtained against the Power Company, in the state courts of Ohio in the above-mentioned quo warranto action.

(2) Circuit Court of Appeals.

Upon appeal by the respondent City the Circuit Court of Appeals held by a two to one decision (Judge Hicks dissenting, but filing no separate opinion):

(a) That the proceedings in the Federal District Court came within the inhibitions of Judicial Code Section 265 (28 U. S. C., Section 379) in that the effect of the decree was to stay the quo warranto proceedings in the state courts, *notwithstanding the fact that the final decree in the state courts had been entered before this suit was filed.*

(b) That the facts of this case did not bring it within the principles of those cases in which the federal courts may enjoin a party from enforcing a state court judgment.

(c) That the proceedings in the Federal District Court were merely an attempt on the part of petitioner to relitigate the issues theretofore determined by the State Courts as *between the respondent City and the Ohio Electric Power Company.*

The Federal District Court held (contrary to the result in the quo warranto action in the state courts) that

the Ohio Electric Power Company had a valid franchise and that the petitioner had a valid lien thereon. These questions were not passed upon by the Circuit Court of Appeals.

C. Questions Presented.

The following questions are presented:

1. Are the federal courts inhibited by Judicial Code Section 265 from granting an injunction, upon application by the mortgagee of a valid and subsisting public utility franchise, restraining a city from depriving such mortgagee of the benefits of its lien on such franchise, merely because the city has won an ouster decree against the mortgagor Power Company in the state courts in a quo warranto case in which neither the mortgagee nor any bondholder was a party or served with any notice?

2. If the federal courts are not so inhibited, is the mortgagee entitled to receive protection by injunction against the destruction of its property rights in the franchise no matter whether such destruction is to be caused by force or by the city's unconscionable enforcement of the ouster decree of the state courts?

3. Is the mortgagee bound by the decision of the state courts in the quo warranto proceedings, to which neither it nor any bondholder was a party, to the effect that the mortgagor has no franchise, or is the mortgagee entitled to a day in court in a forum of its own selection and to a hearing upon issues deemed pertinent by it with respect

to the existence of such franchises and the rights of the mortgagee therein?

D. Statutes Involved.

The statutes involved in the consideration of the foregoing questions, which are printed in the appendix to the separate brief of petitioner, are:

(a) Upon the subject of the scope of the injunction 36 Stat. 1162, (Section 265 Judicial Code), 28 U. S. C. 379.

(b) Upon the subject as of the nature of quo warranto, G. C. of Ohio, Sections 12303, et seq.

(c) On the subject of nature and extent of the franchise rights, Revised Statutes of Ohio 1880, Sections 3454, 3461, 3471; Revised Statutes of Ohio 1890, Section 8752, 83 Ohio Laws, 143; Revised Statutes of 1890, Section 3471a 84 Ohio Laws 7; Revised Statutes, Section 3471a, as amended by Act of April 21, 1896, 92 Ohio Laws, 204.

II.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner respectfully asserts:

1. That the decision of the Circuit Court of Appeals for the Sixth Circuit conflicts with the decisions of the United States Supreme Court, other Circuit Courts of Appeals and prior decisions of the Circuit Court of Appeals for the Sixth Circuit in holding: (1) that the injunction granted by the District Court violates Judicial Code Section 265, and (2) that petitioner had failed to show one of

the essential conditions to justify the Federal Courts below in restraining the respondent City from destroying petitioner's property rights by seeking enforcement of the quo warranto decree in the State Courts.

2. That the decision of the Circuit Court of Appeals for the Sixth Circuit constitutes an untenable decision upon an important question of general law and is in conflict with the decisions of this court in holding, that petitioner's bill of complaint must be dismissed without considering the issues as to the nature, extent and ownership of the franchise rights, thus giving conclusive effect to the quo warranto decision as against the petitioner mortgagee, which was not a party to or served in the quo warranto proceedings.

III.

PRAYER

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 6126, The City of Norwalk, Ohio, defendant-appellant, vs. The Equitable Trust Company of New York, N. Y., plaintiff-appellee, and that the judgment of said Circuit Court of

Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief as to this Honorable Court may seem just and proper.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK.

By GEO. D. WELLES,

EARL F. BOXELL,

Toledo, Ohio,

Of Counsel for Petitioner.

TRACY, CHAPMAN & WELLES,

Toledo, Ohio,

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New York, N. Y.,

Solicitors for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No.....

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Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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A

OPINIONS BELOW

The opinion of the District Court of the Northern District of Ohio, Western Division (filed February 7, 1931) is found at pages 211, et seq. of the record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (filed March 17, 1933), is found at pages 572, et seq. of the record and reported at 63 Fed. (2d), 911.

B

JURISDICTION

Petition for Rehearing was filed on April 15, 1933, within the time provided by the rules of the Circuit Court of Appeals (R. 577) and the Petition for Rehearing was denied May 18, 1933 (R. 639).

The jurisdiction of this court is based upon 43 Statutes, 938 (Judicial Code Section 240), as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347.

C

STATEMENT OF THE CASE

The petitioner, as trustee, by virtue of various mergers, is the successor mortgagee of all the properties, franchises and rights of the Ohio Electric Power Company (an Ohio corporation) in the City of Norwalk, Ohio, (respondent) (R. 277, 278) which were conveyed to the original mortgagee by supplemental mortgage dated May 25, 1925, (filed for record at Norwalk with the Recorder of Huron County, Ohio, June 19, 1925) (R. 412) prior to the acts and assertions of claims of the City of Norwalk, on account of which petitioner's predecessor, The Equitable Trust Company of New York, filed this action in the District Court on January 3, 1930.

About $130,000 of bonds, of a total of $2,600,000 under the mortgage and supplemental mortgage were issued and sold in 1925 upon the basis of the Norwalk properties, including the Norwalk franchise (R. 184-191).

Petitioner contends that then and now under the law of Ohio, as previously declared by the Ohio state courts and the United States Supreme Court, Ohio Electric Power Company was and is the owner and holder of perpetual franchises to use the streets of Norwalk, which two of its predecessor Ohio corporations in title, namely, The Incandescent Light and Power Company, organized in 1891, and Northern Electric Company, organized in 1895, had acquired directly from the State of Ohio by incorporation under the statutes of Ohio in effect between 1887 and 1896.

Quo warranto action against the Ohio Electric Power Company in the Court of Appeals of Huron County, Ohio, was started on May 19, 1926, following two resolutions by the City Council of Norwalk, the first on March 23, 1926, (R. 445) directing the Ohio Electric Power Company to remove its equipment from the streets within thirty days, and the second on May 18, 1926, (R. 449) requesting that the Prosecuting Attorney of Huron County, Ohio, take legal steps under the laws of Ohio in quo warranto to oust the Ohio Electric Power Company. This resolution engaged the Prosecuting Attorney and the City Solicitor as counsel for the City to do all things necessary to accomplish said ouster (R. 449), so that the action was instituted and carried on at the instance and expense of the respondent, City of Norwalk, Ohio. Only the Ohio Electric Power Company was made party defendant to that action. *Neither the petitioner's predecessors ,the petitioner, nor any of the bondholders under the mortgage were made parties to the quo warranto action or served with process or notice of any*

kind or represented in that suit, all of which appears from petitioner's bill of complaint and is admitted by the city's answer. (R. 13, 43). The State Court of Appeals rendered a decree on June 7, 1928, *State of Ohio ex rel Martin v. Ohio Electric Power Company,* 35 Ohio App. Rep. 481, ousting the Ohio Electric Power Company from the streets and public places of the City of Norwalk, Ohio. The Supreme Court of Ohio affirmed that judgment on June 12, 1929, *Ohio Electric Power Company v. State of Ohio, ex rel Martin,* 121 O. S. 235.

The enforcement of the quo warranto decree will destroy entirely the value of the properties of the Ohio Electric Power Company located in the City of Norwalk, Ohio, and consequently wipe out all that substantial portion of petitioner's security under the mortgage. (R. 119)

D

ARGUMENT UPON QUESTIONS PRESENTED

I.

The Circuit Court of Appeals For the Sixth Circuit Erred in Holding (1) That the Injunction Violates Judicial Code, Section 265, and (2) That Petitioner Had Failed to Show One of the Essential Conditions to Justify the Courts Below in Restraining the Respondent City From Destroying Petitioner's Property Rights by Seeking Enforcement of the Quo Warranto Decree in the State Court; AND THE DECISION CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT, OTHER CIRCUIT COURTS OF APPEALS AND THE PRIOR DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

1. After Final Judgment in State Court Judicial Code Section 265, Does Not Inhibit Injunction Against Unconscionable Use Thereof.

This court, as we understand the decisions, has clearly held that Judicial Code Section 265 has no application after the termination of the proceedings in the State Court, when the Federal Court plaintiff seeks only to prevent enforcement or unconscionable use by a party of the judgment obtained in the State Court.

Simon v. Southern Railway, (1915) 236 U. S. 115:

> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment— a new state of facts, not within the language of the statute may arise." (p. 124)

Essanay Film Co. v. Kane, (1922) 258 U. S. 358:

> "But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud *or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of* 1793 *to avoid.*" (p. 360). (Italics ours).

We also respectfully submit that the Circuit Court of Appeals has placed a misconstruction upon the injunction decree of the District Court in interpreting the language

thereof as operating directly upon the State Courts of Ohio. The only proper interpretation upon the face of the language is that the decree is directed to the City of Norwalk and those who may act for the City to prevent the City and its representatives from taking steps or filing applications to move the State Court to enforce the quo warranto decree. The injunction does not run against the State courts or their officers. If the language of the injunction could be construed in any phase as operating directly upon the State courts, it is submitted that the Circuit Court of Appeals should have modified the language so as to remove any doubt as to the scope thereof, or should have remanded the case to the District Court with instructions to do so instead of ordering the dismissal of petitioner's bill.

2. There Was Ample Showing by Petitioner of Conditions Essential to Justify the Courts below in Restraining the Respondent City From Enforcing the Quo Warranto Decree.

The Circuit Court of Appeals announced the proposition that in order to justify federal courts in restraining the respondent city from enforcing the quo warranto decree *one* of the following conditions must be shown: (a) the necessity of protecting federal court jurisdiction properly acquired and subsisting; or (b) that the state court decree was void; or (c) fraud, mistake or accident in the procuring of the state court judgment; or (d) denial of notice and opportunity to be heard in the state court action,

i..e., that petitioner had no knowledge of the state court proceedings until after final judgment therein, or could not have appeared in those proceedings to assert its rights and defenses, in connection with which the federal court plaintiff must appear free from fault or negligence.

It is respectfully submitted that the court below erred in so holding, but nevertheless, that not only one but two of the conditions announced by the court below as prerequisite to the injunction are satisfied, because (1) the state court judgment is of no effect and void as to petitioner, and (2) denial of notice and opportunity to be heard fully appears from the admitted fact that neither petitioner nor any of the bondholders was made a party to the state court action or served with any process therein. It was not incumbent upon petitioner, we submit, to show affirmatively that it had no knowledge of the state court action until after final judgment therein, or could not have appeared therein to assert its rights. Moreover, it appears as a matter of law from the nature of quo warranto under the Ohio statutes that petitioner would have had no standing to assert its rights in the quo warranto suit, even though petitioner had known of that action before final judgment therein.

(1) Conflict of the Decision Below With United States Supreme Court Decisions.

The proposition that the enforcement of a void state court judgment even against one actually named a party to the state court case will be restrained by the federal courts

regardless of Section 265 of the Judicial Code, as we understand it, is undisputed. *Simon v. Southern Railway*, supra, and *Atchison Railway Co. v. Wells*, (1924) 265 U. S. 101.

However, under the opinion of the majority of the Circuit Court of Appeals it appears that a distinction must be made in the application of this rule between a case where one is made a party to the state court action and not served, and a case such as that at bar *where one is neither made a party nor served with notice.*

The opinion of the Circuit Court of Appeals requires that relief must be given in the first case even though the state court defendant had actual (but not legal) notice of the state court proceedings, but holds that in the present case the state court judgment against the Power Company is conclusive and binding upon the present petitioner and that it can have no relief, although it and its predecessor Trustee were neither named as a party nor served in the state court case.

We submit that no such distinction exists, and that the judgment in the second type of case is for all purposes as void and inconclusive as to the mortgagee not made a party as the judgment in the first example, and that the inequitable use of such judgment should be restrained without requiring any showing upon the part of the mortgagee that it was unaware of the State Court proceedings until after final judgment or could not have intervened therein to protect its rights.

In *Old Colony Trust Co. v. Omaha*, (1913) 230 U. S. 100, the situation was like the case at bar in every essential

characteristic. There in the prior suit which was brought by the mortgagor, the utility company, against the City in Federal Court, the City had obtained a final judgment dismissing the bill which upheld a city ordinance, the enforcement of which would cut away the rights of the Trustee, which judgment had been affirmed by the Circuit Court of Appeals, and the case was pending upon appeal by the mortgagor company to the United States Supreme Court when the later suit was brought in Federal Court by the Trustee (Mortgagee) against the City for an injunction against the enforcement of the ordinance. Hence the suit in reality was one to enjoin the City from making an unconscionable use of the prior judgment.

The record in that case (which we have obtained and examined minutely) shows not only that the Trustee was not made a party to the prior suit, but there was no proof or showing by the Trustee that it did not at all times know of the pendency of the prior suit or that it could not have intervened therein, and there was no showing of any of the other conditions, one of which the Circuit Court of Appeals for the Sixth Circuit has said is essential as a basis for relief in this case, and, furthermore, in the Old Colony case the contention was made, as in the case at bar, that the second suit was nothing more than an attempt to relitigate the issues which had been presented in the prior suit. This court in that case said at page 122 of the opinion:

> "A prior suit by the Electric Company against the City, largely but not entirely like the present,

resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296."

The most recent pronouncement of this court upon the point, we believe, is found in *American Surety Company v. Baldwin,* (Nov. 14, 1932) 287 U. S. 156, at page 164:

"The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare National Exchange Bank v. Wiley, 195 U. S. 257; Cooper v. Newell, 173 U. S. 555. *And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure.* Simon v. Southern Ry. Co., 236 U. S. 115; Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (Italics ours)

In *Atchison Ry. Co. v. Wells*, 265 U. S. 101, where Wells, a Colorado citizen, had sued the Santa Fe in Texas, and had secured a writ of garnishment to a Texas Railway Company, but was not able to make personal service upon the Santa Fe in Texas, and the Santa Fe received notice by personal service on one of its officers in Kansas of the Texas suit in time to have appeared therein, it was contended that the Federal Court plaintiff should have entered into the State Court action and there asserted its rights. This court held the injunction restraining the enforcement of the judgment as being void, was proper, and said:

> "The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (pp. 103, 104).

Nor would it have been enough to justify the decision of the court below even had the petitioner learned by any chance extra judicial notice, that questions as to the franchise rights were being adjudicated in the then pending quo warranto suit in the state court in which petitioner was not made a party or served with process.

Coe v. Armour Fertilizer Works, (Fla. 1915) 237 U. S. 413:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the

validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court." (pp. 424, 425).

(2) Conflict of the Decision Below With Decisions From Other Circuits.

Western Union Telegraph Co. v. Tompa (C. C. A. 2—1931) 51 Fed. (2d) 1032, was a suit by the Telegraph Company to enjoin Tompa from prosecuting an action in the New York Supreme Court against the New York Central Railroad Company, Tompa having been injured on a railroad car while working for the Telegraph Company on premises of the New York Central Railroad Company, the Telegraph Company having a standing agreement to indemnify the railroad against any claims on account of such injuries, and Tompa having agreed with the Telegraph Company not to sue the Railroad Company on account of any such injuries, but to look to the relief plan of the Telegraph Company or Workmen's Compensation. *The Telegraph Company had notice of the pending suit in the state court.* Though the federal court refused to issue an injunction against the proceedings in the state court, *it did enjoin the plaintiff therein from enforcing any judg-*

ment she might obtain. As against the contention that the Telegraph Company should have asserted its rights in the state court, the Circuit Court of Appeals of the Second Circuit said:

> "The prosecution of the defendant's pending suit is in violation of her agreement with the plaintiff, and the plaintiff has no adequate remedy at law. *Even if we assume that the plaintiff has a remedy in an independent action in equity in the state court or, without deciding, by petition to intervene in the now pending suit, such a remedy does not deprive it of the right to seek redress in this action, curtail the power, or do away with the duty of a federal court to grant relief within the limits, and to the full extent, of its own jurisdiction.* Simon v. Southern Railway Co., supra; Hyde & Oglesby v. Stone, 20 How. 175, 15 L. Ed. 874." (p. 1034) (Italics ours).

Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, (C. C. A. 4, 1922) 282 Fed. 811, certiorari denied 260 U. S. 749, referred to by this court in *Atchison Ry Co. v. Wells,* supra, involved a situation directly analagous to the one now under consideration. The Ohio Firestone Company entered into a contract with a South Carolina Company, which filed suit for a breach of contract against the Ohio corporation in a South Carolina State Court and service was made upon an agent of the West Virginia Firestone Company. A default judgment was entered and action taken to collect the judgment by attachment of accounts belonging to the West Virginia Firestone Company. Both

companies brought an action in Federal Court to enjoin the enforcement of this judgment, although they still had an opportunity to obtain relief in the state court case. In that case enforcement of the state court judgment was restrained, although it affirmatively appeared that it was still possible for the federal court plaintiffs to set up their rights and seek relief in the state court case. In granting the relief the court said:

> "* * * * It follows, therefore, that upon the record now before us we have to decide whether a corporation against whom a void final judgment has been obtained may, where the necessary jurisdictional facts exist, have the enforcement of the same restrained, *and also whether another corporation, whose property is sought to be taken either upon the mistaken theory that a final judgment has been obtained against it, or that by reason of its relationship to another corporation against whom the judgment was obtained,* may, where jurisdictional facts exist, obtain the aid of a federal court to restrain and enjoin, in a proper case, persons so acting from taking its property in satisfaction of such judgment.
>
> "We think both questions should be answered in the affirmative. *This was also the conclusion at which the lower court arrived, and its refusal to exercise the authority was solely upon the ground that the state court wherein the judgment was obtained might, at any time within a year from the recovery of the judgment, or, where the judgment was attacked on equitable grounds, at any time after a year, grant complete relief. This, we think, was error, for, even though it be conceded that com-*

plainants, or either or both of them, might have appeared by petition in the court in which the judgment was obtained and applied to have the judgment set aside upon grounds similar to those contained in the bill filed in the federal court, they were not confined to this relief alone. The necessary diversity of citizenship, and the amount involved, gave them their right to ask relief in the proper federal court, and a federal court, in the exercise of its equity power, may, and should in a proper case, enjoin the collection of a judgment fraudulently or *unlawfully* obtained in a state court." (p. 814) (Italics ours).

(3) Conflict of the Decision Below With a Prior Decision of the Circuit Court of Appeals for the Sixth Circuit.

The same situation arose in *Ballard & Ballard Company v. Munson Steamship Line* (C. C. A. 6-1928) 25 Fed. (2d) 252, certiorari denied 278 U. S. 611. Judgment was obtained by default in a state court of Kentucky against the Steamship Line. It was void because the Steamship Line was not doing busines in Kentucky and the agents served were not its agents. The Steamship Line learned of the default eleven days after it was taken and under Kentucky law the judgment did not become final for forty-nine days thereafter. Although the Steamship Line made no attempt to go into the state court action and assert its rights, the court affirmed the issuance of an injunction restraining the state court plaintiff from enforcing the judgment.

(4) Petitioner Could Not Have Asserted Its Rights as Mortgagee in the Quo Warranto Suit.

Even if the view as interpreted by the court below that petitioner was bound to make a showing that it had no extra judicial notice or knowledge of the pendency of the state court proceedings and hence could not have obtained relief in the state court, be accepted as generally applicable, we submit that the record in the case as it stands satisfies the requirement for the further reason, that as a matter of law petitioner could not have asserted its rights in the quo warranto suit even if it had known about it in time.

The procedure in quo warranto actions is regulated strictly by statute (General Code of Ohio Sections 12303-12344). *State Ex Rel v. Columbus Del. & M. Elec. Co.*, (1922) 104 O. S. 120. The sections of the Ohio Code governing the procedure in quo warranto are exclusive, and the other general sections of the code with reference to actions and proceedings have no application. The quo warranto sections make no provision by which petitioner could have intervened in the quo warranto suit to obtain any relief therein.

That petitioner could not have intervened therein as a matter of right, see *Toledo Traction Light & Power Co. v. Smith*, (1913, District Court, Northern District of Ohio) 205 Fed. 643, where it is said by Judge Killits:

> "* * * In the first place, the statutes of Ohio do not award an action in quo warranto as a matter of right * * *. It would seem to us that the remedy

by quo warranto is therefore not quite complete, where the party interested must appeal to the discretion of some other person or body." (p. 662).

Concededly, if petitioner had no standing to go into the quo warranto suit other than a questionable right to appeal to the discretion of the state court (for the effect of this see *Coe v. Armour Fertilizer Works*, supra,) the instant case is not only brought squarely within the rule of *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, where the bill alleged that the express company had not been in any wise "negligent or at fault", and other cases relied upon by the court below, but it likewise is brought squarely within the very letter of the proposition enunciated by the court below, when it says there must be a showing by petitioner either that it had no notice of the state court proceeding *or could not have asserted its rights therein.* If this be true in the case of a void judgment against a named defendant, it must be all the more so in this case where petitioner was not even named as a party to the state court suit.

Moreover, the record affirmatively shows that if there was negligence upon anyone's part, it was upon the part of the City. The supplemental mortgage was filed for record in the Recorder's office on June 19, 1925, which was prior to the passage of the ordinance directing the filing of the quo warranto proceedings. Thus the City knew that the Trustee under the mortgage had a claim to the franchise of the Ohio Electric Power Company, if one

existed. Section 12310 Ohio General Code provides:

> "All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise."

As the City saw fit to ignore the rights of the petitioner under the mortgage in the quo warranto proceedings, we submit it is unconscionable that the petitioner residing in a distant state should be presumed nevertheless to have learned of the City's action against the Power Company, and now be held to have lost its rights as a result of the proceedings in the quo warranto case. This amounts to saying that the City by deliberately omitting to include the Trustee under the mortgage in the quo warranto case, nevertheless obtained the same rights against the Trustee as though the Trustee had been included in those proceedings and had had its day in court therein, a proposition which has never heretofore had the sanction of any court.

II.

The Federal Courts, Not Being Inhibited by Judicial Code Section 265 From Granting the Injunction Under the Facts of This Case, Petitioner is Entitled to Protection by Injunction Against Destruction of its Property in the Franchises Whether Such Destruction is Threatened by Force or Unconscionable Enforcement of the Ouster Decree.

The foregoing authorities demonstrate, we submit, not only that the injunction granted by the District Court does

not violate Judicial Code Section 265, but that the circumstances present in this case are appropriate to satisfy the conditions essential to the granting of relief by the federal courts. It is beyond controversy, we think, that in such a case the petitioner mortgagee is entitled to protection by way of injunction against the destruction of its property rights in the franchises whether such destruction is threatened by force or the unconscionable enforcement by the respondent city of the state court ouster decree.

In *Simon v. Southern Railway Company*, supra, this court said:

> "* * * For even where there has been process and service, if the court 'finds that the parties have been guilty of fraud in obtaining a judgment * * * it will deprive them of the benefit of it.' McDaniel v. Traylor, 196 U. S. 415, 423. *Much more so will equity enjoin parties from enforcing those obtained without service. For in such case the person named as defendant 'can no more be regarded as a party than any other member of the community.'* " (p. 122) (Italics ours).

In *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, this court said:

> "In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, *the provision does not * * * prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement*

will be contrary to recognized principles of equity and the standards of good conscience." (p. 183) (Italics ours).

III.

The Petitioner Mortgagee Not Having Been a Party to or Served in the Quo Warranto Proceedings, is Not Bound by the Quo Warranto Decision; But is Entitled to its Day in Court in a Forum of its Own Selection and Upon Issues Deemed Pertinent by it Upon the Question of the Existence of the Franchises and its Rights therein; the Circuit Court of Appeals Erred in Giving Conclusive Effect to the Quo Warranto Decision by Refusing to Pass Upon Said Questions.

1. Petitioner is Entitled to an Independent Determination by the Federal Courts Upon the Questions of the Existence of the Franchises and its Rights Therein.

The Circuit Court of Appeals in holding that this suit could not be maintained in the Federal District Court, because it was merely an attempt by petitioner to relitigate the issues theretofore determined in the state courts between the respondent city and the Ohio Electric Power Company, virtually held the quo warranto decree binding upon petitioner.

In doing so, we submit that the Circuit Court of Appeals not only came into conflict with the decisions of this court but erroneously departed from the rule as laid down by its own prior decisions.

In *Postal Telegraph Cable Co. v. Newport,* (1918) 247 U. S. 464, this court held that a decision of the state court which denied asserted federal rights through the application of a former state court judgment would not conclude this court if such application was clearly inconsistent with the right of due process of law. We respectfully submit that this principle applies here and that the decision of the court below denying petitioner's right to have the question as to the franchise rights passed upon by the federal courts, because of the former judgment (quo warranto decree) in the state court should not be allowed to stand. In the Postal Telegraph case the court said at page 476:

> "* * * The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U. S. 274, 277; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423), *so it cannot without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*" (Italics ours).

That the Circuit Court of Appeals should have treated the quo warranto judgment the same as a void judgment in so far as it affected petitioner's property rights for

failure of the respondent to make petitioner a party to that action and thus give it a day in court, see: *United Sheet & Tin Plate Co. v. Hess,* (C. C. A. 6-1908) 159 Fed. 889:

> "A decree upon either aspect of the case would be fruitless, unless the mortgagees would be thereby concluded. That they would not be, not being parties, is too plain to be discussed. Louisville Trust Company v. Cincinnati, 76 Fed., 296, 22 C. C. A. 334; Keokuk & Western Railroad Company v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450." (p. 892).

We think it is well settled generally that a mortgagee is entitled to an injunction against the enforcement of any judgment rendered in a case to which he was not a party and which will destroy the value of his security. Specifically see the opinion of the court below in the oft-cited case of *Louisville Trust Co. v. Cincinnati,* 76 Fed. 296 (1896), like the instant case in its essential feature, where the first thing decided was:

> "• • • There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. *It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly im-*

peaching their validity and duration without being made a party thereto.'' (p. 299) (Italics ours).

In a case where the requisite federal jurisdiction is present, as here, the rule that the federal courts will make an independent determination of the true meaning of applicable state statutes and law is well expressed in the following language from the case of *Kuhn v. Fairmont Coal Co.*, 215 U. S., 349, at page 360:

> ''* * * So, when contracts and transactions are entered into and *rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued.'' (Italics ours).

and in *Louisville Trust Company v. City of Cincinnati,* supra, the Circuit Court of Appeals below recognized this rule in the following language:

> ''* * * The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of another state, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment.'' (p. 304).

2. The Decision of the Circuit Court of Appeals in Holding that Petitioner's Bill Must Be Dismissed Without Considering the Issues as to the Nature, Source and Extent of the Franchise Rights Results in Leaving the Respondent City at Liberty to Destroy Petitioner's Right in the Franchise Either by Force or by Application to the State Courts to Enforce the Decree Against the Ohio Electric Power Company, and Thus Deprive Petitioner of Vested Property Rights Without Ever Having Had a Day in Court.

The Circuit Court of Appeals in its opinion in the case at bar, speaking of the issues raised by the pleadings and the evidence with respect to the source, nature and extent of the franchise rights of petitioner's mortgagor, said:

> "We do not find it necessary to pass upon these questions or to consider in connection therewith, as argued, the scope of the City's powers and the effect of its acquiescence in the use of its streets after the expiration of the city ordinances, * * *" (R. 573)

As we have previously pointed out, the District Court sustained the position of the petitioner as against the respondent city upon these issues, and since the Circuit Court of Appeals did not see fit to consider them, the findings of the District Court upon the facts and the application of the law of Ohio thereto theoretically stand unaffected by the opinion of the Circuit Court of Appeals, although the practical result is to leave the rights subject

to complete destruction at the instance of the respondent city.

3. Under the Statutes of Ohio, as Construed by the Supreme Court of Ohio at the Time the Power Company Mortgage Upon the Norwalk Franchise Was Executed, Such Franchise Was Valid and Was Derived From the State.

At the time the petitioner's predecessor, The Equitable Trust Company of New York, acquired its rights under the mortgage in May 25, 1925, as the District Court found, it had been definitely established in Ohio by *Zanesville v. Zanesville Telephone & Telegraph Company*, (1901) 64 O. S. 67, *Farmer v. Columbiana Telephone Company*, (1905) 72 O. S. 526, *Queen City Telephone Co. v. Cincinnati*, (1905) 73 O. S. 64, and *Hardin-Wyandot Lighting Company v. Upper Sandusky*, (1916) 93 O. S. 428, 251 U. S. 173, that electric light and power companies organized in Ohio between 1887 and 1896 acquired franchises by direct grant from the State of Ohio under the statutes then in effect, subject only to the making of an agreement with the municipality as to the mode of use of its streets, or in the event or failure to reach an agreement, to the direction of the Probate Court fixing such mode of use, and that such rights were not subject to defeat or impairment by a municipality through its insistence upon unreasonable or arbitrary terms as to mode of use or the exaction of any compensation therefor. That such franchises were perpetual had been settled in Ohio by the decisions in the case

of *State ex rel v. Northern Ohio Traction & Light Co.*, (1915) 93 O. S. 466, reversed, *Northern Ohio Traction Co. v. Ohio*, (1918) 245 U. S. 574, and afterward by *Ohio Public Service Co. v. State ex rel Fritz*, (June 2, 1925) 113 O. S. 325, reversed (April 11, 1927) 274 U. S. 12.

In view of the fact that the Circuit Court of Appeals has appeared to assume and treat the case at bar as being simply an effort to obtain a readjudication of the law and facts which were before the State Court of Appeals and the Supreme Court of Ohio in the quo warranto action, we venture to point out briefly the important distinctions between the defense of Ohio Electric Power Company to the quo warranto action and the presentation of petitioner's case in the federal courts. The case at bar was presented upon the theory that there was an agreement at all times as to the mode of use of the city streets between the Ohio Electric Power Company and the city (whereas, the defense in the quo warranto suit was upon the basis that there was no evidence one way or another as to agreement about mode of use); that the company and its predecessors continued to observe the mode of use so agreed upon with the acquiescence and consent of the city at all times; that due to the expenditure of considerable sums of money upon the system in the city and the payment of taxes by Ohio Electric Power Company and its predecessors of which the City received its proportion, the City was estopped to deny the existence of any agreement as to mode of use or the existence of the franchise rights; and finally that the passage of an ordinance by the City in 1924 regulating the

use of the streets by Ohio Electric Power Company, as well as other utilities, with which the company complied completely at the direction of the city, amounted at once to a consent to the continued use of the streets by the City and an estoppel against the City from asserting that the company was not using the streets with the City's consent in a manner approved by the City. *All of these vital elements were lacking in the presentation of the defense of the Ohio Electric Power Company to the quo warranto action in the state courts.*

The decision of the Circuit Court of Appeals in refusing to consider the franchise questions operates to give the quo warranto decision conclusive effect as a judicial repudiation of the law of Ohio as previously declared by its Supreme Court and by this court in cases brought up from Ohio in reliance upon which the bondholders represented by the petitioner invested their money. That the result is to deprive petitioner of its vested property rights without due process of law is clear.

A change of law by judicial decision in effect depriving an investor by contract or otherwise of his investment (which would be the result under the decision below) is as abhorrent to justice as such a change of law by legislative action, as was long ago announced by this court in *Gelpcke vs. City of Dubuque* (1863) 1 Wallace 175.

The hardship upon the bondholders who acquired their bonds in 1925, upon the strength of a clear cut line of applicable local decisions and of those of this court in cases brought up from Ohio, is obvious. Under such cir-

cumstances, as we understand the decisions, this court, following the rule in the *Gelpcke* case, has many times reiterated that in cases where the federal jurisdiction is present, federal courts should hold themselves free to decide what the state law was and to enforce it as laid down by the State Supreme Court before the contracts were made, rather than in later decisions.

Moore-Mansfield Co. v. Electrical Co., (1914) 234 U. S. 619, 625; *Tidal Oil Company v. Flanagan*, (1924) 263 U. S. 444, 452; *Great Northern R. R. v. Sunburst Oil & Refining Company*, (1932) 287 U. S. 358, 364, 77 Law Ed. 153, 157.

That the Ohio Supreme Court has taken the view that the prior state court decisions are the law for intermediate transactions, see:

Thomas v. State of Ohio, ex rel, Gilbert, 76 O. S. 341;
Lewis & Lewis v. Symmes, 61 O. S. 471.

4. The Circuit Court of Appeals Erred in Ordering the Bill Dismissed Without Affording Petitioner an Opportunity to Show That it Had no Knowledge of the Quo Warranto Proceedings Until After Final Judgment Therein.

Finally, we venture to repeat the suggestion made upon the petition for rehearing before the Circuit Court of Appeals that at the worst the bill should not be dismissed, but the case should be remanded to the District Court with instructions to receive testimony from both parties as to whether petitioner had been guilty of any negligence bar-

ring relief in equity. In order to demonstrate that such procedure would not be futile, and that such evidence could be produced, we included in the appendix to the petition for rehearing affidavits from the various officers and counsel for the petitioner and its predecessors, who were in charge of the mortgage trust here involved in its behalf, which showed that petitioner had no knowledge of the quo warranto action until the summer of 1929, subsequent to the Supreme Court decision in the quo warranto case on June 12, 1929. This we especially urge, since there was no suggestion in the petition or the evidence or claim in the City's answer that petitioner did have any knowledge of the quo warranto proceedings before the entering of final judgment therein. That this would be a proper exercise of discretion see: *Panama Mail S. S. Co. v. Vargas,* 281 U. S. 670; *U. S. v. Rio Grande Dam & Irrigation Co.,* 184 U. S. 416; *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins,* 176 U. S. 167; *Columbus Gas & Fuel Co. v. Columbus* (C. C. A. 6) 55 F. (2d) 56; *Wilson v. Spencer,* (C. C. A. 5) 261 F. 357; *Lee v. State Bank & Trust Co.,* (C. C. A. 2) 38 F. (2d) 45.

E

CONCLUSION

We respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the errors herein pointed out may be cured, that the conflict of the decision below with those of this court,

other circuits and its own prior decisions may be removed, that the general and local law may be properly and authoritatively defined, that the judgment of the Circuit Court of Appeals should be reversed, and that of the District Court below sustained in order that justice may be done your petitioner, and a grave injustice to bondholders be avoided, and that for such purpose a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

(a) Scope of the Injunction.

36 Stat. 1162. (Section 265 Judicial Code), 28 U. S. C. 379:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. §720; Mar. 3, 1911, c, 231, §265, 36 Stat. 1162.)"

(b) Nature of Quo Warranto.

G. C. of Ohio, Sections 12303, et seq.

"§12303. Proceedings against a person.—A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state;

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, work a forfeiture of his office;

3. Against an association of persons who act as a corporation within this state without being legally incorporated. (R. S. §6760.)"

"§12304. Against a corporation.—A like action may be brought against a corporation:

1. When it has offended against a provision of

an act for its creation or renewal, or any act altering or amending such acts;

2. When it has forfeited its privileges and franchises by non-user;

3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises;

4. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law. (R. S. §6761.)"

"§12305. Who may commence action.—When directed by the governor, supreme court, or general assembly, the attorney general or a prosecuting attorney, shall commence such action. When, upon complaint, or otherwise, either of such officers has good reason to believe that any case specified in the next preceding section can be established by proof, he shall commence an action. (R. S. §6762.)"

"§12310. All claimants to be made defendants.—All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise. (R. S. §6767.)"

"§12311. Actions in quo warranto, where brought.—An action under this chapter can be brought only in the supreme court or in the court of appeals of the county in which the defendant, or one of the de-

fendants resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business; except that, when the attorney general files the petition, it may be brought in the court of appeals of Franklin county. (103 v. 433; R. S. §6768.)"

"§12312. Leave to file petition; notice.—Upon application for leave to file a petition, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto. If leave be granted, an entry thereof shall be made on the journal, or, the fact be indorsed by the judge on the petition, which shall then be filed. (R. S. §6769.)"

"§12313. Issue of summons and service.—When the petition is filed without leave and notice, a summons shall issue, and be served as in other cases. Such summons may be sent to and returned by the sheriff of any county by mail, who shall be entitled to the same fees thereon as if it had been issued and returned in his own county. (R. S. §6770.)"

"§12314. Service by publication.—When a summons is returned not served because the defendant, or its officers or office, cannot be found within the county, the clerk must publish a notice for four consecutive weeks in a newspaper published and of general circulation in the county, setting forth the filing and substance of the petition. Upon proof of such publication, the default of the defendant may be entered, and judgment rendered thereon, as if he

had been served with summons. (R. S. §6771.)"

"§12315. Pleadings after petition.—The defendant may demur or file an answer, which may contain as many several defenses as he has, within thirty days after the filing of the petition, if it was filed on leave and notice, or after the return day of the summons; and the plaintiff may file a demurrer or a reply to such answer within thirty days thereafter. (R. S. §6772.)"

"§12317. Judgment where office, franchise, etc., found to have been usurped.—When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs. (R S. §6774.)"

"§12323. Judgment when corporation has forfeited its rights.—When, in such action, it is found and adjudged that, by an act done or omitted, a corporation has surrendered or forfeited its corporate rights, privileges, and franchises, or has not used them during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved. (R. S. §6780.)'

"§12324. Other acts.—When it is found and adjudged in such case, that a corporation has offended in a matter or manner which does not work such surrender or forfeiture, or has misused a fran-

chise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense or the exercise of such power. (R. S. §6780.)"

(c) Nature and Extent of Franchise Rights.

Revised Statutes of Ohio 1880, Sections 3454, 3461, 3471:

"§3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (50 v. 274, §47.)"

"§3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of

the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, §5.)"

"§3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

Revised Statutes of Ohio 1890, Section 8752, 83 Ohio Laws, 143:

"(8752) §1. Be it enacted by the General Assembly of the State of Ohio, that a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all

wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires."

Revised Statutes of Ohio, 1890, Section 3471a, 84 Ohio Laws 7:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies. (January 26, 1887, 84 v. 7.)"

Revised Statutes, Section 3471a, as amended by Act of April 21, 1896, 92 Ohio Laws, 204:

"AN ACT

To amend section 3471a of the Revised Statutes of Ohio.

Section 1. Be it enacted by the General Assembly of the State of Ohio, That section 3471a, as enacted January 26, 1887, (84 O. L., 7), be and the said section hereby is amended so as to read as follows:

Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, except section

three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and

this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal in any circuit court of the state.

SECTION 2. That said section 3471a shall be and the same hereby is repealed; and this act shall take effect and be in force from and after its passage."

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1933.

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

Supreme Court of the United States

October Term, 1933.

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

Supreme Court of the United States

October Term, 1933.

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division (filed February 7, 1931) is not officially reported. It is printed at pages 211-239 of the record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (filed March 17, 1933) is found at pages 572-576 of the record and is reported in 63 Fed. (2) 911.

B.

JURISDICTION ON CERTIORARI

A petition for rehearing was filed in the Circuit Court of Appeals on April 15, 1933, within the time provided by

the rules of that court (R. 577), which was denied May 18, 1933 (R. 639). The jurisdiction of this court is based upon 43 Statutes 938, (Judicial Code, Sec. 240) as amended by the Act of February 13, 1925, U. S. C., Title 28, Sec. 347. This court granted the petition for writ of certiorari Oct. 9, 1933. (R. 640)

C.

STATEMENT OF THE CASE

Primary and Ultimate Questions

The petitioner, by virtue of various mergers is the successor trustee and mortgagee of all the properties, franchises and rights of the Ohio Electric Power Company (an Ohio public utility corporation) in the City of Norwalk, Ohio, respondent (R. 277, 278), which were conveyed to the original mortgagee by a Supplemental Mortgage dated May 25, 1925 (filed for record at Norwalk with the Recorder of Huron County, Ohio, June 19, 1925) (R. 412) prior to the acts and assertions of claims by the respondent City, on account of which petitioner's immediate predecessor, The Equitable Trust Company of New York, filed this action in the District Court for theNorthern District of Ohio, Western Division, on January 3, 1930. A total of Two Million Six Hundred Thousand Dollars ($2,600,000) of bonds issued by Ohio Electric Power Company are outstanding under theMortgage and Supplemental Mortgage, of which about One Hundred Thirty Thousand Dollars ($130,000) were issued and sold in 1925 upon the basis of the Norwalk properties, including the Norwalk franchises (R. 184, 191).

The rights of petitioner and the bondholders represented by it were acquired prior to a suit in quo warranto filed May 19, 1926, in the Court of Appeals of Huron County, Ohio, and carried on at the instance of the re-

spondent City against the mortgagor Power Company, resulting in an ouster decree against the Power Company, *State of Ohio, ex rel, Martin v. Ohio Electric Power Company,* 35 O. App. 481, affirmed June 12, 1929, 121 O. S. 235, 167 N. E. 877. *Neither petitioner nor any other representative of the bondholders was a party to the quo warranto case, or were served with process or represented in that suit, all of which appears from petitioner's bill and is admitted by the city's answer.* (R. 13, 43)

The enforcement of the quo warranto decree would destroy entirely all that substantial portion of petitioner's security under the mortgage represented by the value of the properties of Ohio Electric Power Company located in the City of Norwalk, Ohio. There would be substantially a loss of One Hundred Eight Thousand Dollars ($108,000). (R. 119). The full amount of the bonds, a part of which were based on the Norwalk properties and franchises, could not have been sold had it been a fact that the company had no franchise rights to operate in Norwalk. (R. 187, 188).

The primary question is whether petitioner can and should have a day in court for the determination of its rights as mortgagee of these franchises. The ultimate question is as to its right to an injunction to protect its rights in and lien upon the franchises and property of the Ohio Electric Power Company in the City of Norwalk against wrongful destruction by the respondent, City of Norwalk.

The Judgments Below

(1) District Court.

The petitioner's predecessor, the Equitable Trust Company of New York, contending that it was the mortgagee of valid and existing perpetual franchises held by

the mortgagor Power Company to use the streets and public places of the respondent City, brought this suit in the Federal District Court for an injunction restraining the respondent City and its representatives from interfering by force (theretofore actually used and further threatened, as the District Court found, R. 237) with the exercise by the Power Company of its franchise rights, and also restraining the respondent City from taking any steps to procure the enforcement of the judgment of ouster, which the City (in the name of the State of Ohio) had obtained against the Power Company in the State Courts of Ohio in the quo warranto suit. The District Court (Judge Hahn) held that the Power Company had valid and existing franchises derived from the State of Ohio and not from the City, and in accordance with the prayer of petitioner's predecessor, enjoined the respondent City and its representatives for so long as the petitioner or its successors or the holders of bonds under the Mortgage and Supplemental Mortgage should have any interest in or lien upon the properties and franchises of the mortgagor Power Company in the City of Norwalk.

(2) Circuit Court of Appeals.

Upon appeal by the respondent City, the Circuit Court of Appeals held by a two to one decision (Judge Hicks dissenting, but filing no separate opinion):

(a) That the proceedings in the Federal District Court came within the inhibitions of Judicial Code, Sec. 265 (28 U. S. C., Sec. 379), in that the effect of the decree was to stay the quo warranto proceedings in the State Courts, *notwithstanding the fact that the final decree in the State Courts had been entered before this suit was filed; and notwithstanding that the petitioner was not a party to the state court case.*

(b) *That, notwithstanding that the present petitioner was not a party to the quo warranto proceedings and the decree therein was not an adjudication against petitioner,* nevertheless a court of equity was without authority to enjoin its enforcement at the instance of the petitioner for the protection of petitioner's rights in the franchise as mortgagee thereof, in the absence of a showing that the decree was void as to the Ohio Electric Power Company, or that it had been obtained by fraud or accident by the City of Norwalk, or that it had been rendered by the court upon a mistake of fact, and in the absence of a further showing that the petitioner did not have timely knowledge of the quo warranto proceeding, or that the petitioner could not have intervened therein; and that the petitioner failed to make the required showing. (Record, pp. 575-6)

The Federal District Court held (contrary to the result in the quo warranto action in the State Courts) that the Ohio Electric Power Company had valid franchises, and that petitioner had a valid lien thereon. *These questions were not passed upon by the Circuit Court of Appeals.*

Division of the Issues

The specifications of assigned errors which are to be urged necessarily fall into two groups, pages 20-21 infra. The issues raised by the first group, specifications I, II and III, relate to those errors which we claim because of the action of the Circuit Court of Appeals in denying petitioner a day in court by dismissing the bill *without passing upon the questions as to the source, nature and extent of the franchise rights and petitioner's interest therein, and right to protection thereof.* The second, which is covered by specification IV, relates to our claim that the court below erred in not sustaining petitioner's claim with respect to the source, nature and extent of the franchise rights and

petitioner's interest therein and right to protection thereof.

We understand that this court, if it finds that the court below erred in dismissing the bill without passing upon the questions with respect to the franchises and petitioner's interest therein, may either enter a decree of reversal, and remand the case to the court below for a consideration of all the issues conformably to the decision of this court, or may itself proceed to a determination of all the issues and enter a final decree. Therefore, for the convenience of the court, we mark a division of the statement of the case at this point. The essential facts for the consideration of the first group of errors assigned have been stated above, so that if this court desires, its attention may at once be directed to the argument relating to the first group of errors assigned beginning at page 21 infra. That portion of the statement of the case immediately below, pages 6 to 20, has to do more particularly with the facts bearing upon the petitioner's claim that its mortgagor is possessed of perpetual franchises derived from the State of Ohio upon which petitioner has a valid lien which should be protected against threatened destruction by the respondent city.

Further Facts

The respondent City, located in Huron County, has been a city since about April 4, 1881 (R. 38), with a population from 1890 to the present varying between 7,000 and 8,000 people (R. 280), and without substantial change in its territorial extent (R. 52, 60).

Early in 1890 a partnership, styled "The Norwalk Incandescent Light Company," was formed by six men for the purpose of generating and furnishing electricity in the City of Norwalk (R. 51, 211), the partners intending to organize a corporation, turn over their rights to it and take

stock therein in proportion to their respective interests (R. 60, 61, 65). The representatives of the partnership told the City Council what they proposed to do (R. 61).

On October 7, 1890, upon application of the partnership, the City Council passed an ordinance entitled "An Ordinance to Amend an Ordinance Entitled, An Ordinance to Grant Certain Privileges as Therein Set Forth to The Incandescent Light Company of Norwalk, Ohio, Passed July 30, 1890". The substantive part of the ordinance (Exhibit B to Second Amendment and Supplement to Bill of Complaint, R. 36) reads as follows:

> "Section 1. That the Norwalk Incandescent Light Company, of Norwalk, Ohio, its successors and assigns are hereby granted, for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks, alleys and public grounds of said city for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use a system of incandescent lighting in said City—Provided that the said company its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said posts or poles and wires on Main street in said city shall be at least twenty feet high, and of the usual height otherwise and be so placed as not to interfere with the travel upon such streets or other places nor with any ornamental or shade trees without the consent of the owners thereof or of the city Commissioner and provided further that all those parts of such streets or other public places in erecting said poles or wires, shall be kept and maintained in good order by said Company its successors and assigns, and provided further that said posts and wires shall be so placed as not to interfere with the flow of

water in any drain or gutter of said city. The points for the location of such poles or posts shall be determined under the direction of the Street Commissioner of said Council. *This grant of way is not exclusive* and the said Council reserves the power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such right shall not be used so as to interfere with any rights hereby granted." (Italics ours).

The ordinance of October 7, 1890, was identical with the ordinance of July 30, 1890, except that it did not specify a particular system of incandescent lighting to be used (R. 36). The ordinance was accepted by the partnership immediately (R. 62, 63, 212). The partnership shortly after July 30, 1890, set about the erection of a plant for the generation of electricity, and a distribution system throughout the City was put into operation shortly after October 7, 1890, supplying the City with light for its streets and public buildings and the inhabitants of the City with current for domestic and commercial use (R. 53, 212). The same system of pole lines carried direct current wires for current to light the streets and alternating current wires for electricity for domestic and commercial use (R. 57, 212). This system of pole lines, including extensions by the construction of two high tension lines, one one-fourth and one three-fourths miles in length, respectively, and other shorter extensions (R. 78, 80, 82, 84) and necessary replacements, is now operated by Ohio Electric Power Company, petitioner's mortgagor (R. 64, 277, 279) for supplying alternating current to the inhabitants of the City for domestic and commercial use.

A complete chain of title covering all properties, franchises and rights in the City of Norwalk from the partner-

ship formed in 1890, including any and all additions thereto down to and including petitioner's mortgagor, Ohio Electric Power Company, through all its predecessors appears from the record. The following table gives the names of the various owners and operators of the properties, rights and franchises, with the respective periods of operation, and dates of incorporation where the latter is important:

Name.	Period of Operation	Date of Incorporation
The Norwalk Incandescent Light Company (Partnership)	October, 1890, to March 7, 1891	
The Incandescent Light & Power Company (Corporation)	March 7, 1891 to Feb. 25, 1893	Mar. 7, 1891
J. W. Foster and F. H. Jones, Assignees	Feb. 25, 1893 to March 7, 1895	
George P. Jones and Mayme C. Foster	Mar. 7, 1895 to May 20, 1895	
The Northern Electric Company (Corporation)	May 20, 1895 to June 28, 1897	May 17, 1895
The Northern Gas & Electric Company (Corporation)	July 16, 1897 to May 8, 1900	
The Norwalk Gas & Electric Company (Corporation)	May 8, 1900 to Feb. 14, 1903	
The Cleveland & Southwestern Traction Company (Corporation)	Feb. 14, 1903 to Feb. 5, 1907	

The Cleveland Southwestern & Columbus Railway Company, (Corporation)	Feb. 5, 1907 to April 30, 1924	
The Cleveland Southwestern Railway & Light Company, (Corporation)	April 30, 1924 to Dec. 31, 1924	
Victor Emanuel	Dec. 31, 1924 to May 22, 1925	
Ohio Electric Power Company, (Corporation)	May 22, 1925 to Present	Aug. 12, 1924

We shall allude only to such corporations, contracts and other facts in sequence from 1890 to the present time as appear material upon the contentions of the parties.

In March, 1891, The Incandescent Light & Power Company, a corporation, was formed, its Articles of Incorporation containing the following purpose clause:

> "3. The purpose for which said corporation is to be formed is for the furnishing of the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, electric and steam power and steam and electricity for heating for profit." (R. 282).

The incorporators, with the possible exception of one man, were identical with the members of the partnership known as The Norwalk Incandescent Light Company (R. 60, 65), which thereupon transferred all of its property, including whatever rights were given by the ordinance of October 7, 1890, to the corporation by written bill of sale (R. 54, 62, 212). The City Council, upon application of the partners, confirmed their action in transferring all the partnership property to the corporation. (R. p. 62). The corporation continued the operation of the generating plant and

distribution system in the same manner as it had been conducted by the partnership (R. 55, 213).

On May 17, 1895, The Northern Electric Company, with its location and principal business to be transacted at Norwalk, Ohio, was incorporated for the purpose, all as stated in its articles, as follows:

> "Said corporation is formed for the purpose of manufacturing and producing electricity for light, heat and power." (R. 289).

The Northern Electric Company, succeeding to the title to all the properties, rights and franchises of its predecessors, proceeded with the operation of the system in the same manner as theretofore, and on July 16, 1895, entered into a written contract with the respondent City to light the streets and public buildings for ten (10) years, commencing September 1, 1895 (R. 214). The contract provided that the company should build and keep in operation for the period of ten (10) years a first class electric light plant. In addition to the purchase price of Thirteen Thousand Five Hundred Dollars ($13,500) for the properties and rights acquired, The Northern Electric Company expended Twenty-five or Thirty Thousand Dollars in the construction of a new plant (R. 72), with the understanding that the company, by virtue of its incorporation under state laws, possessed a continuous right to serve private consumers without interruption on the part of the City (R. 73); otherwise the plant would not have been built (R. 75, 76), an understanding which was a correct interpretation of the law of Ohio as it then existed (see discussion of Ohio Statutes and decisions pp. 50 to 70 infra). The formation of this company was discussed with the City officials beforehand and the new plant was double the capacity required to furnish energy for both the public and private.

needs of the City (R. 68). The generating plant as it now stands is capable of caring for the entire requirements of the Norwalk customers of Ohio Electric Power Company, but as the company now brings current into the City over a high tension line, the generating plant is used only for standby or emergency purposes.

The public lighting contract of July 16, 1895, nearing expiration by its terms on August 31, 1905, The Cleveland & Southwestern Traction Company and the respondent City on April 13, 1905 entered into a public lighting contract to begin September 1, 1905, (Defendant's Ex. H; R. 541). During the period of this contract, the Power Companies continued to use the same system of poles and wires which had been constructed originally, with such additions as were made thereto, direct current wires being used for street lighting and alternating current for furnishing current to public buildings and private individuals, both sets of wires being on the same system of poles (R. 64, 72, 132).

This contract is too lengthy to be quoted in full herein, but reference is made to it by reason of the contention by the respondent City that it terminated all rights of the predecessors of Ohio Electric Power Company in the City as of August 31, 1915. An examination of this contract, which appears at pages 541-551 of the record, demonstrates that it was concerned solely with public lighting and did not undertake to deal with the rights of the company to use the streets and public places for the purpose of serving private consumers. The provisions of this contract will be discussed in some detail in the course of the argument. At the request of the respondent City, service for lighting streets and public places was continued by the Power Company after the expiration date of the contract until January 1, 1916, when the City put into operation a municipal plant (R. 87, 88). Since then all public lighting has been

supplied from the municipal plant. Ohio Electric Power Company and predecessors have continued to serve private consumers.

During the Fall of 1914, conferences were held between the City officials and officers of The Cleveland Southwestern & Columbus Railway Company, then operating the plant and system in the City. Mention is made of these conferences here because the respondent City has claimed that the company requested a new franchise to operate a system in the City to commence August 31, 1915, on which date the public lighting contract of April 13, 1905, would expire, and because the respondent City has seemed to take the position that the company indicated thereby its feeling that it had no rights in the City after August 31, 1915. It was claimed by the respondent City that a newspaper account of such conferences, printed at pages 503-510 of the record, showed that the company was suggesting that a contract with the City for a period of ten (10) years be made, with the right on the part of the City to terminate the same at the end of any year and take over the company's plant at its appraised value. It is plain from the newspaper article in question that any proposals considered related only to changes in operations during the period prior to the expiration of the contract of April 13, 1905, as is also shown by a letter directed by the company to the Mayor (Plaintiff's Ex. 81; R. 510). A request for a twenty-five (25) year franchise submitted by Mr. C. J. Taylor employed by the company and withdrawn by him on January 20, 1914, was made without any authority from his superior officers or the Board of Directors, and was withdrawn upon the instructions of his superiors as soon as they learned of it (R. 83).

On July 1, 1924, the Council of the respondent City enacted an ordinance regulating the construction and maintenance of "all electric light and power wires, telephone, signal and trolley wires in operation in the corporate limits of the City of Norwalk, Ohio," (Plaintiff's Ex. 38; R. 438). The Cleveland Southwestern Railway & Light Company, one of the predecessors of Ohio Electric Power Company was then operating its system in the respondent City, and continued to do so subject to and in accordance with the provisions of this ordinance, which regulated in detail the mode of use of the streets and public places by electric light and power companies. The record shows that the respondent City called upon Ohio Electric Power Company repeatedly to comply with this ordinance and that the company did comply (Plaintiff's Exs. 51 to 61, 63, 66, R. 127-130; R. 457-469.) This ordinance has never been changed and it remains in effect as admitted in the answer of the respondent City (R. 48).

Petitioner's mortgagor, Ohio Electric Power Company, as stated above, was organized August 12, 1924, and on May 22, 1925, by conveyances from Victor Emanuel, acquired the plant and distribution system, together with all rights and franchises in the City of Norwalk (Plaintiff's Exs. 22, 23, 24 and 25; R. 335, 358, 360, 363). Prior to that transfer Ohio Electric Power Company had executed its Mortgage and Deed of Trust to Seaboard National Bank of the City of New York, predecessor of petitioner, (Plaintiff's Ex. 28; R. 379), and on May 25, 1925, the company executed its Supplemental Mortgage and Deed of Trust conveying all of its properties "and also such other contracts, franchises, rights, privileges, and agreements of the grantor in the City of Norwalk, Ohio." to secure such first mortgage bonds as might be issued under the original Mortgage and Deed of Trust (Plaintiff's Ex. 29; R. 412).

One Hundred Thirty Thousand Dollars ($130,000) Series A 6½% Bonds of an aggregate of Nine Hundred Forty-nine Thousand Dollars ($949,000) of that series were issued in 1925 upon the basis of the Norwalk properties, including the franchises (R. 186, 187; Plaintiff's Exs. 31, 32; R. 425, 428), and the Norwalk properties are included in the security for all other bonds issued, the total now outstanding being Two Million Six Hundred Thousand Dollars ($2,600,000). The bonds were purchased by A. C. Allyn & Company, Bankers, and sold by them to the public under two prospectuses containing letters from Victor Emanuel, Vice President of Ohio Electric Power Company to A. C. Allyn & Company, in which the franchises were referred to as follows:

> "The franchises under which the Company operates are satisfactory in form and without burdensome restrictions. The Company's properties are operated under the jurisdiction of the Public Utilities Commission of Ohio and the issuance of these bonds has been authorized by the Commission." (Plaintiff's Exs. 78 and 79; R. 489-496; R. 184-191)

Each prospectus also contained three specific references to the Norwalk property of the Ohio Electric Power Company and the business conducted in that City, and A. C. Allyn & Company in purchasing the bonds understood that the above quoted statement applied to the Norwalk property as well as other properties of the company and by virtue of the letter relied upon the company's having satisfactory franchises to operate in Norwalk without burdensome restrictions. (R. 186, 187, 188). The quoted statement was based upon a written opinion of the then Ohio counsel of Ohio Electric Power Company to the effect that the company had the right to continue its operation

in the City of Norwalk in the same manner and to the same extent as its predecessors had operated. (Plaintiff's Ex. 76; R. 478, R. 179-183.) Resale of the bonds by A. C. Allyn & Co. could not have been effected but for the inclusion of the above quoted statement in the prospectus. (R. 188).

On March 23, 1926, the Council of the respondent City passed a resolution in terms requiring the Ohio Electric Power Company to remove from the streets, alleys and other public places of the City its electrical equipment within thirty (30) days (Plaintiff's Exs. 41, 42; R. 444-446.) On May 18, 1926, the Council, upon non-compliance with the foregoing resolution, passed a resolution ordering that complaint be filed with Edgar G. Martin, Prosecuting Attorney of Huron County, Ohio, requesting him to take such legal steps as might be provided by the laws of Ohio in quo warranto proceedings to oust the Ohio Electric Power Company, *and this resolution further expressly engaged Edgar G. Martin as Prosecuting Attorney, Charles Suhr as City Solicitor of Norwalk, and G. Ray Craig to do all things necessary in quo warranto proceedings for the ouster of the Ohio Electric Power Company, so that the quo warranto proceedings were initiated and carried on at the instance of the respondent City* (Plaintiff's Exs. 44, 45; R. 448, 449). The quo warranto suit was filed on May 19, 1926 and carried on with the result as stated above, page 3.

While the quo warranto action was pending, counsel for the City and for Ohio Electric Power Company entered into an agreement that the City would not interefere with the operations of the company and the company would not attempt to extend its lines until the quo warranto case should be decided by the State Court of Appeals. (R. 104)

While this agreement between counsel was in effect, City employees under the direction of Mr. Irvin, Superintendent of Electricity and Water of the City, proceeded

as the District Court found "surreptitiously and practically in the night time in removing nine or ten poles" of the Power Company in the early morning of October 26, 1927 (R. 237) The District Court further found from Mr. Irvin's own testimony that he was in close touch with the situation and must have known of the agreement of counsel that there should be no interference with the property of Ohio Electric Power Company, pending the litigation in the State Courts, that Irvin was keen to prevent competition of the company with the City in the commercial lighting business, that the situation and feeling evidenced by the acts and conduct of Mr. Irvin had not been aided or allayed by the litigation in the trial court, and the District Court therefore came to the conclusion, as was fully warranted by the evidence, that unless an injunction issued there would be further interference with the property of the Power Company. That the action of Mr. Irvin and the employees under his direction was upon the direct authority of the Director of Public Service of the City, was entirely clear from the directions contained in a letter written by Irvin to the local telephone company at Norwalk which carried the approval of the Director of Public Service, (Plaintiff's Exhibit 62, R. 466) and from the testimony of Webster and Irvin (R. 140, 155). Plaintiff's testimony also showed that upon the occasion in question three transformers of Ohio Electric Power Company were removed and that the wires were left hanging within a few feet of the ground while carrying their usual load of electricity, thus creating a severe hazard. (R. 97, 98, 106 and 126).

The findings of the District Court referred to above, with reference to the necessity of an injunction to prevent further destruction by force of the property of Ohio Electric Power Company at the instance of the respondent City,

have further support from the fact that upon the same day that the bill of complaint in this case was filed, Mr. E. F. Boxell of counsel for the petitioner called upon Mr. G. Ray Craig of Norwalk, who had been, as above stated, employed by the City to assist in conducting the quo warranto case. Mr. Boxell stated to Mr. Craig that the bill of complaint had been filed, that he regarded Mr. Craig as chief counsel for the City of Norwalk in the quo warranto case, and accordingly made the suggestion to Mr. Craig that the temporary injunction then in force against the City in the case pending in the Court of Common Pleas of Huron County, Ohio, be permitted to remain in effect pending a hearing upon this case in the United States District Court. The injunction in the Court of Common Pleas had been secured by counsel for the Company immediately upon their learning of the activity of the city employees on the morning of October 26, 1927 in removing poles and transformers of Ohio Electric Power Company. Upon this occasion Mr. Craig stated definitely that although he had just then learned of the bill of complaint filed in this action, that so far as he was concerned Ohio Electric Power Company would receive no further favors from the City of Norwalk, and as he stated, "we" will oust the Ohio Electric Power Company from the City of Norwalk as soon as possible (R. 107, 115). This is undisputed. And it is equally clear from the testimony of Mr. Pruner who was present at the interview between Mr. Craig and Mr. Boxell that Mr. Craig assumed to express for the City the attitude that no favors would be granted. (Pruner R. 107-112).

From the incorporation of the Incandescent Light and Power Company in 1891 until the passage of the ouster resolution March 23, 1926 (Plaintiff's exhibit 42, R. 445), no objection was made by the respondent City to the occupancy of its streets and public places by the Power Com-

pany and its predecessors in title. *In fact no objection has ever been made by the City upon the ground that the mode of use of its streets and public places was not in accordance with that prescribed by the City Council.* Over the period mentioned, the Power Company and its various predecessors made additions and improvements to the plant and equipment, and extensions and changes in the various lines, and expended large sums of money in doing so. In 1895 the Northern Electric Company built a new plant costing at least $25,000 over and above the investment of $13,500 in the existing property acquired from its predecessors (R. 72). In the period from 1910 to 1916, the Cleveland, Cincinnati and Columbus Railway Company expended a minimum of between $20,000 and $25,000 for improvements, maintenance and repairs to the distribution system (R. 78, 81).

Following the acquisition of the system by Ohio Electric Power Company, that company spent between $18,000 and $20,000 for replacements, betterments and repairs (R. 94, 99). In each of the years from 1911 to 1929, both inclusive, Ohio Electric Power Company and its respective predecessors were assessed for payment of taxes upon all their property situated in Norwalk, which taxes were paid, and the respondent City received its share of all taxes collected upon real and personal property located within its limits (Plaintiff's Exhibit 1, R. 279, 280.) There exists joint use of poles by the municipal system and Ohio Electric Power Company which had been the situation for many years previous to the time for trial (R. 92, 152). An ordinance authorizing such joint use was passed January 4, 1916 (Plaintiff's Exhibit 37, R. 436.) All of the foregoing facts were well known to the City. The occupancy of the city streets and public places has at all times been open and notorious, and the operation of the privately

owned plant and system has been continuous from 1890 to the present time.

D.

SPECIFICATION OF THE ASSIGNED ERRORS WHICH ARE INTENDED TO BE URGED

I.

The Circuit Court of Appeals erred in holding that the injunction violates Judicial Code Section 265.

II.

The Circuit Court of Appeals erred in not holding that the Petitioner as the mortgage trustee was entitled to a hearing on the merits of its case on the showing made that it was not a party to the quo warranto proceedings, that it had a pre-existing lien on the Norwalk franchises and properties of Ohio Electric Power Company, and that the enforcement of the state court judgment would irreparably injure its property rights therein.

1. The quo warranto decree is void and inconclusive as to petitioner.

2. Petitioner was entitled to maintain this suit unembarrassed by the quo warranto decree.

3. Although, as above stated, the petitioner is entitled to a readjudication in the federal courts of the facts and law determined in the quo warranto proceedings, in fact its case, as presented to the courts below, rests upon vitally different facts and theories of the law from those presented by the Company in the quo warranto suit.

III.

The Circuit Court of Appeals erred in not holding that the questions as to the existence of the franchise

rights and petitioner's interest therein should be determined according to the law of Ohio as established by its Supreme Court at the time the mortgage was made and the bonds were issued in reliance thereon, which was prior to the quo warranto suit—the further effect of the decision below is to impair the obligation of the franchise contracts and petitioner's contract made in reliance upon the franchise contracts, and results in the taking of petitioner's property without due process of law in violation of the federal constitution.

IV.

The Circuit Court of Appeals erred in not holding that petitioner is the mortgagee under its mortgage and supplemental mortgage from Ohio Electric Power Company of perpetual franchises to use the streets and public places of Norwalk which Ohio Electric Power Company's predecessors, The Incandescent Light and Power Company and The Northern Electric Company, respectively, derived from the State of Ohio by incorporation under the statutes in effect between 1887 and 1896, and in not affirming the decree of the District Court granting an injunction for the protection of petitioner's rights.

E.

ARGUMENT

The topical index at the front of this brief constitutes a summary of the argument.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE INJUNCTION GRANTED BY THE DISTRICT COURT VIOLATES JUDICIAL CODE SECTION 265.

The final decree of the District Court enjoins the

"* * * City of Norwalk, Ohio, its attorneys, officers,

officials, agents, employes and representatives and all persons, whomsoever, to whom notice of this order shall come, * * *"

(1)

"* * * from in any manner interfering with or interrupting the full exercise of any and all of said franchise rights of the Ohio Electric Power Company * * *"

and from

"* * * doing any act to dismantle, wreck or remove any part of said existing system * * *"

and (2)

"* * * from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio. * * *" (R. 241, 242)

so long as the bondholders' rights remain in existence. The Circuit Court of Appeals regarded the latter part of the injunction as operating directly upon the Court of Appeals of Huron County, Ohio.

1. The Injunction is Directed Only Against the City and Persons Acting For It.

We respectfully submit that the Circuit Court of Appeals misconstrued the order of the District Court. The decree is directed only to the City of Norwalk and those acting for the City to prevent the City and its representatives from taking steps or filing applications to move the State Courts to enforce the quo warranto decree. The in-

junction does not run against the State Courts or their officers.

Marshall v. Holmes, 141 U. S. 589, at pages 599, 600:

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. *A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.*" (Italics ours)

2. After Final Judgment in State Court Judicial Code, Section 265, Does Not Inhibit Injunction Against Unconscionable Use Thereof.

The injunction granted by the District Court is not directed against proceedings in the State Court quo warranto action, which had long since terminated, but it denies to the respondent City unconscionable use of that judgment. As the petitioner was not a party to the quo warranto proceedings, to leave the City free to enforce the quo warranto judgment to the injury or destruction of petitioner's lien upon the franchises and property of the power company would be just as unconscionable, as to leave it free to do so, if petitioner had been a party to the quo warranto proceeding and a judgment had been obtained against it by fraud, accident or mistake therein. This court, as we

understand the decisions, has clearly held, under such circumstances, that Judicial Code, Section 265, has no application, *Simon v. Southern Railway,* (1915) 236 U. S. 115:

> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise." (p. 124)

Essanay Film Co. v. Kane, (1922) 258 U. S. 358:

> "But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud *or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of 1793 to avoid.*" (p. 360). (Italics ours)

3. Petitioner is Entitled to Protection by Injunction Against Destruction of its Rights in the Norwalk Franchises and Properties Either Threatened by Force or by Unconscionable Enforcement of the Quo Warranto Decree.

No suggestion has ever been made that the injunction in its other important phases, namely in enjoining the City and its representatives from using force to remove or cause the destruction of the properties of petitioner's mortgagor in the City, operates upon the State Courts. That there was imminent danger of damage to the properties by force, the District Court expressly found (R. 237). The case stands here with that finding unimpaired by anything contained in the opinion of the Circuit Court of Appeals. Even if the injunction (contrary to our view) could be considered in any phase as operating directly upon the State Courts,

it is submitted that the Circuit Court of Appeals could and should only have modified the language so as to remove any doubt as to the scope thereof, or should have remanded the case to the District Court with instructions to do so instead of ordering the dismissal of petitioner's bill.

The Circuit Court of Appeals, while recognizing that the decree of the District Court was broad enough to enjoin the City and its agents from forcibly removing the wires and poles (R. p. 573), summarily thrust this feature of the case to one side, and took the view that the whole purpose of the suit was to stay the hand of the State Court in enforcing the ouster decree. We respectfully submit that in so doing, the court below did not give due regard to the findings of the District Court, which, as observed, stand unimpaired by the Circuit Court of Appeals' decision. The District Court found:

> "* * * The court is of the opinion that, unless restrained and enjoined by this court, there will be further interference with the property of the Ohio Electric Power Company pending litigation in the Federal Courts.
>
> * * * The plaintiff is entitled to an injunction which, it is hoped, will prevent similar acts and a repetition of like conduct on the part of the City." (R. p. 237)

The trial court was in position to observe the witnesses and sense the strong feeling current among the officers of the respondent City, and as the Circuit Court of Appeals for the Sixth Circuit has held in *City of Toledo v. Toledo Railways & Light Company*, 259 Fed. 450, at pages 453 and 454:

> "* * * Where the trial court has seen and heard the witnesses, we are always reluctant to set aside its finding of fact; and especially must that be true

> where the rightfulness of the conclusion depends largely upon that general knowledge possessed by all citizens of the community, including the judge, and which cannot be reproduced in the printed record. What action the city, through its official representatives, was likely to take, could be determined by the trial judge much better than by us, and, upon a review of the proofs and the arguments here, we see no occasion to disturb his conclusion."

The decision of the court below, if permitted to stand, would thus leave the case in such position that petitioner and the rights of the bondholders represented by it would be left absolutely at the mercy of the City, not only to destroy those rights by seeking enforcement of the ouster decree, but free to proceed by self help and force to remove the properties of petitioner's mortgagor, in spite of the fact that both the requisite Federal and equity jurisdictions, unhampered by any inhibition of Judicial Code Section 265, are present. We submit, therefore, that the decision of the court below in disregarding the necessity for an injunction against self help by the City, as well as against unconscionable use of the quo warranto decree, is wholly untenable.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE PETITIONER AS THE MORTGAGE TRUSTEE WAS ENTITLED TO A HEARING ON THE MERITS OF ITS CASE ON THE SHOWING MADE THAT IT WAS NOT A PARTY TO THE QUO WARRANTO PROCEEDINGS, THAT IT HAD A PREEXISTING LIEN ON THE NORWALK FRANCHISES AND PROPERTIES OF OHIO ELECTRIC POWER COMPANY, AND THAT THE ENFORCEMENT OF THE STATE COURT JUDGMENT WOULD IRREPARABLY INJURE ITS PROPERTY RIGHTS THEREIN.

The purely federal jurisdiction is of course present in this case, based both upon diversity of citizenship and the claimed violations of constitutional guaranties. It must be recognized, as stated in the case of *Simon v. Southern Railway, supra,* that a showing of federal jurisdiction is not alone sufficient to support the injunction. A proper equitable basis must be demonstrated. In other words, a Federal Court has the same power to enjoin any unconscionable use of a judgment of a State Court that any State Court would have. *Simon v. Southern Railway, supra; Union Railway Company v. Illinois Central Railway Company* (C. C. A. 6 ,1913) 207 Fed. 745. The State Courts of Ohio exercise this jurisdiction. See *Anderson v. Anderson,* 8 O. 108, enjoining the enforcement of a foreign judgment; *Wood v. Stanberry,* 21 O. S. 142, enjoining execution under a void judgment; and *Place v. Sweetzer,* 16 O. 142, *enjoining enforcement of a judgment against property of one not a party to the action.*

The Circuit Court of Appeals announced the proposition that in order to justify federal courts in restraining the respondent city from enforcing the quo warranto decree *one* of the following conditions must be shown; (a) the necessity of protecting federal court jurisdiction properly

acquired and subsisting; or (b) that the state court decree was void as between the parties thereto; or (c) fraud, mistake or accident in the procuring of the state court judgment; plus denial of notice and opportunity to be heard in the state court action, i. e., that petitioner had no knowledge of the state court proceedings until after final judgment therein, or could not have appeared in those proceedings to assert its rights and defenses.

In so holding, we respectfully submit that the court below committed at least two errors. The first of these errors was in holding that the state court decree must be shown to have been void *as between the parties to the state court litigation,* instead of holding that the state court decree must be shown to be void or not conclusive as to the plaintiff in the federal suit. The second error was in holding that the plaintiff in the federal suit, not having been made a party defendant in the state court action, must nevertheless affirmatively establish that it had no casual or extra judicial notice of the pendency of the state court proceedings until after final judgment therein, or that it could not have appeared in those proceedings to assert its rights and defenses.

We shall herein undertake to establish that the federal court plaintiff in such a suit, as that at bar, is entitled to protection against a state court judgment rendered in a case to which it was not a party, and which, if enforced, will injure or destroy its pre-existing property rights, and that in such a suit as this it is of no importance whatever whether the federal court plaintiff had casual or extra judicial notice of the pendency of the state court proceedings, or whether it could have intervened therein and have asserted its rights. In short, we shall establish that it is the well settled law that in such cases the federal court plaintiff may have relief, although it has seen fit deliber-

ately to ignore the state court porceedings and to rely solely and purposely upon its right to later protection in the federal courts. We shall establish this, although, as we shall also show, the present record does not disclose that the present petitioner or its predecessor had even such casual or extra judicial notice or any opportunity to make any such choice of forums.

Moreover, it appears as a matter of law from the nature of quo warranto under the Ohio statutes that petitioner could not have intervened as of right in the quo warranto suit, even though petitioner had known of that action before final judgment therein.

1. Quo Warranto Decree Void as to Petitioner.

The proposition that the enforcement of a void state court judgment even against one actually named a party to the state court case but not validly served will be restrained by the federal courts regardless of Section 265 of the Judicial Code, as we understand it, is undisputed. *Simon v. Southern Railway,* supra, and *Atchison Railway Co. v. Wells,* (1924) 265 U. S. 101. That a mortgagee can not be deprived of his security in franchises by a proceeding directly impeaching their validity and duration without being made a party thereto, and hence as to petitioner the quo warranto decree is void, see: *Old Colony Trust Co. vs. Omaha* (1913), 230 U. S. 100; *Louisville Trust Co. v. Cincinnati,* (C. C. A. 6 1896), 76 Fed. 296, 299; *United Sheet & Tin Plate Co. v. Hess* (C. C. A. 6, 1908) 159 Fed. 889.

However, under the opinion of the majority of the Circuit Court of Appeals it appears that a distinction must be made in the application of this rule between a case where one is made a party to the state court action and not served, and a case such as that at bar *where one is neither made a party nor served with notice.*

The opinion of the Circuit Court of Appeals permits relief to be given in the first case even though the state court defendant had actual (but not legal) notice of the state court proceedings, and paid no attention thereto, but holds that in the present case the state court judgment against the Power Company is conclusive and binding upon the present petitioner and that it can have no relief, *although it and its predecessor Trustee were neither named as a party nor served with process in the state court case.*

We submit that no such distinction exists, and that the judgment in the second type of case is for all purposes as void and inconclusive as to the mortgagee not made a party as the judgment in the first example, and that the inequitable use of such judgment should be restrained without requiring any showing upon the part of the mortgagee that it was unaware of the State Court proceedings until after final judgment, or could not have intervened therein to protect its rights.

2. Petitioner Was Entitled to Maintain This Suit Unembarrassed by the State Court Quo Warranto Decree.

a. Supporting Federal Authorities.

In *Old Colony Trust Co. v. Omaha,* (1913) 230 U. S. 100, the situation was like the case at bar in every essential characteristic bearing upon the point, except that there the prior suit was in equity in which the mortgagee might have intervened. There in the prior suit which was brought by the mortgagor, the utility company, against the City in Federal Court, the City had obtained a final decree dismissing the bill and sustaining as valid a city ordinance, the enforcement of which would cut away the rights of the Trustee, which decree had been affirmed by the Circuit Court of Appeals, and the case was pending upon appeal

by the mortgagor company to the United States Supreme Court, when the later suit was brought in Federal Court by the Trustee (Mortgagee) against the City for an injunction against the enforcement of the ordinance. Hence the suit in reality was one to enjoin the City from making an unconscionable use of the prior decree.

The record in that case (which we have obtained and examined minutely) shows not only that the Trustee was not made a party to the prior suit, but there was no proof or showing by the Trustee in its own suit that it did not at all times know of the pendency of the prior suit or that it could not have intervened therein, and there was no showing of any of the other conditions, one of which the Circuit Court of Appeals for the Sixth Circuit has said is essential as a basis for relief in this case. Furthermore, in the Old Colony case the contention was made, as in the case at bar, that the second suit was nothing more than an attempt to relitigate the issues which had been presented in the prior suit. This court in that case said at page 122 of the opinion:

> "A prior suit by the Electric Company against the City, largely but not entirely like the present, resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. *The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other.* Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296." (Italics ours)

If an attempt be made to distinguish *Old Colony Trust Co. v. Omaha,* supra, upon the ground that Judicial Code, Section 265, was not there involved, a complete answer is that Section 265 has no bearing on the present inquiry, which is whether or not a showing is necessary by a plaintiff in a suit like the one at bar that it had no knowledge of the prior suit or opportunity to seek protection of its rights therein.

The most recent pronouncement of this court upon the point, we believe, is found in *American Surety Company v. Baldwin,* (Nov. 14, 1932) 287 U. S. 156, at page 164:

> "The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare National Exchange Bank v. Wiley, 195 U. S. 257; Cooper v. Newell, 173 U. S. 555. *And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure.* Simon v. Southern Ry. Co., 236 U. S. 115; Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (Italics ours)

In *Atchison Ry. Co. v. Wells;* supra, 265 U. S. 101, where Wells, a Colorado citizen, had sued the Santa Fe in Texas, and had secured a writ of garnishment to a Texas Railway Company, but was not able to make personal service upon the Santa Fe in Texas, and the Santa Fe received notice by personal service on one of its officers in Kansas of the Texas suit in time to have appeared therein, it was contended that the Federal Court plaintiff should have entered into the State Court action and there should have asserted its rights. This court held the injunction re-

straining the enforcement of the judgment as void was proper, and said:

> "The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (pp. 103, 104).

Nor would it have been enough to justify the decision of the court below even had the petitioner learned by any chance extra judicial notice, that questions as to the franchise rights were being adjudicated in the then pending quo warranto suit in the state court in which petitioner was not made a party or served with process.

Coe v. Armour Fertilizer Works, (Fla. 1915) 237 U. S. 413:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court." (pp. 424, 425).

Western Union Telegraph Co. v. Tompa (C. C. A. 2, 1931) 51 Fed. (2d) 1032, was a suit by the Telegraph Company to enjoin Tompa from prosecuting an action in the New York Supreme Court against the New York Central Railroad Company, Tompa having been injured on a rail-

road car while working for the Telegraph Company on premises of the New York Central Railroad Company, the Telegraph Company having a standing agreement to indemnify the railroad against any claims on account of such injuries, and Tompa having agreed with the Telegraph Company not to sue the Railroad Company on account of any such injuries, but to look to the relief plan of the Telegraph Company or Workmen's Compensation. *The Telegraph Company had notice of the pending suit in the state court.* Though the federal court refused to issue an injunction against the proceedings in the state court, *it did enjoin the plaintiff therein from enforcing any judgment she might obtain.* As against the contention that the Telegraph Company should have asserted its rights in the state court, the Circuit Court of Appeals of the Second Circuit said:

> "The prosecution of the defendant's pending suit is in violation of her agreement with the plaintiff, and the plaintiff has no adequate remedy at law. *Even if we assume that the plaintiff has a remedy in an independent action in equity in the state court or, without deciding, by petition to intervene in the now pending suit, such a remedy does not deprive it of the right to seek redress in this action, curtail the power, or do away with the duty of a federal court to grant relief within the limits, and to the full extent, of its own jurisdiction.* Simon v. Southern Railway Co., supra; Hyde & Oglesby v. Stone, 20 How. 175, 15 L. Ed. 74." (p. 1034) (Italics ours)

See also *Firestone Tire and Rubber Co. v. Marlboro Cotton Mills,* (C. C. A. 4, 1922) 282 Fed. 811, certiorari denied 260 U. S. 749, referred to by this court in *Atchison Ry. Co. v. Wells,* supra, which involved a situation directly analogous to the case at bar.

The same situation arose in *Ballard & Ballard Company v. Munson Steamship Line* (C. C. A. 6,—1928) 25 Fed. (2d) 252, certiorari denied 278 U. S. 611. Judgment was obtained by default in a state court of Kentucky against the Steamship Line. It was void because the Steamship Line was not doing business in Kentucky and the agents served were not its agents. The Steamship Line learned of the default eleven days after it was taken and under Kentucky law the judgment did not become final for forty-nine days thereafter. Although the Steamship Line made no attempt to go into the state court action and assert its rights, the court affirmed the issuance of an injunction restraining the state court plaintiff from enforcing the judgment.

In *Postal Telegraph Co. v. Newport* (1918), 247 U. S. 464, this court held that a decision of the state court, which denied asserted federal rights through the application of a former state court judgment would not conclude this court, if such application was clearly inconsistent with the right of due process of law. We submit that the principle announced by this court at page 476 of its opinion applies here.

> "* * * The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U. S. 274, 277; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423), *so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment*

against one who is neither a party nor in privity with a party therein.'' (Italics ours)

In a case where the requisite federal jurisdiction is present, as here, the long established rule that the federal courts will make an independent determination of the true meaning of applicable state statutes and law under the circumstances of this case, as we understand, still has the sanction of this court.

Moore-Mansfield Const. Co. v. Electrical etc. Co., 234 U. S. 619;

Tidal Oil Co. v. Flanagan (1924), 263 U. S. 444.

As was said in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, at page 360:

> ''* * * So, when contracts and transactions are entered into and *rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the right of parties accrued.'' (P. 360) (Italics up to first comma are ours).

and in *Louisville Trust Co. v. City of Cincinnati, supra,* the Circuit Court of Appeals below recognized this rule in the following language:

> ''* * * The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of another state, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment.''

b. Authorities Relied Upon by Circuit Court of Appeals.

Expressions will be found in the cases relied upon by the court below to the effect that the federal court plaintiff must have been free from fault or negligence, but this is stated generally. *Not one of those cases denies relief upon the ground that mere failure to apply for leave to intervene in the state court action by one not in privity with the defendant after extra judicial notice constitutes negligence barring relief in equity.* Those cases show, we think, that none of them is a precedent for any such rule as the court below applied against this petitioner.

In *National Surety Company v. State Bank* (C. C. A. 8, 1903), 120 Fed. 593, injunctive relief was properly granted because of failure to get actual notice, due to unavoidable accident. In *Denton v. Baker* (C. C. A. 9-1899), 93 Fed. 46, there was privity so that the party necessarily was concluded by the result in the state courts. In *Brown v. County of Buena Vista* (1877), 95 U. S. 157, relief was denied because the federal court plaintiff had been served in the prior case and its allegations of fraud were not proved, and it was guilty of laches. In *Knox County v. Harshman* (1890), 133 U. S. 152, the ground of the decision was that fraud could not be proved and that service upon the county in the prior suit was regular. In *Marshall v. Holmes* (1891), 141 U. S. 589, the case came before this court on error to review an order denying removal from the state court, and although the petition did allege that fraud was not discovered until after judgment, we submit no rule was announced requiring the federal court plaintiff to prove that she had no notice of the prior suit or could not assert her rights therein. In fact, we maintain these cases support our position. See especially *Marshall v. Holmes,* at page 596, where this court approved the settled doctrine that:

> "* * * 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' * * *"

3. Petitioner Could Not Have Intervened as of Right in the Quo Warranto Suit—Petitioner Was Not Negligent.

Even if the view of the court below that petitioner was bound to make a showing that it had no extra judicial notice or knowledge of the pendency of the state court proceeding or could not have intervened therein and hence could not have obtained relief in the state court, be accepted as generally applicable, we submit that the record in the case as it stands satisfies the requirement for the further reason, that petitioner could not have intervened as of right in the quo warranto suit even if it had known about it in time.

The procedure in quo warranto actions is regulated strictly by statute (General Code of Ohio Sections 12303-12344, printed in the appendix to our brief in support of our petition for certiorari) 104 O. S. 120. The sections of the Ohio Code governing the procedure in quo warranto are exclusive, and the other general sections of the code with reference to actions and proceedings have no application. The quo warranto sections make no provision by which petitioner could have intervened in the quo warranto suit to obtain any relief therein.

That petitioner could not have intervened therein as a

matter of right, see *Toledo Traction Light & Power Co. v. Smith,* (1913), District Court, Northern District of Ohio) 205 Fed. 643, where it is said by Judge Killits:

> "* * * In the first place, the statutes of Ohio do not award an action in quo warranto as a matter of right. * * *. It would seem to us that the remedy by quo warranto is therefore not quite complete, where the party interested must appeal to the discretion of some other person or body." (p. 662.)

Concededly, if petitioner had no standing to go into the quo warranto suit other than a questionable right to appeal to the discretion of the state court (for the effect of this *see Coe v. Armour Fertilizer Works,* supra,) the instant case is not only brought squarely within the rule of *Wells Fargo & Co. v. Taylor,* (1920) 254 U. S. 175, where the bill alleged that the express company had not been in any wise "negligent or at fault", and other cases relied upon by the court below, but it likewise is brought squarely within the very letter of the proposition enunciated by the court below, when it says there must be a showing by petitioner either that it had no notice of the state court proceeding *or could not have asserted its rights therein.* If this be true in the case of a void judgment against a named defendant, it must be all the more so in this case where petitioner was not even named as a party to the state court suit.

4. Negligence, if Any, Was That of Respondent City.

Moreover, the record affirmatively shows that if there was negligence upon anyone's part, it was upon the part of the City. The supplemental mortgage was filed for record in the Recorder's office on June 19, 1925, which was long prior to the passage of the ordinance directing the filing of the quo warranto proceedings. Thus the City

knew that the Trustee under the mortgage had a claim to the franchise of the Ohio Electric Power Company, if one existed. Section 12310 Ohio General Code provides:

> "All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise."

That the City engineered the quo warranto suit and was the real party plaintiff is clear. (Plaintiff's Ex. 45, R. 449) This court, we are confident, will look behind the nominal plaintiff to see who is the real plaintiff. *Miller vs. The State,* 79 U. S. 159. As the City saw fit to ignore the rights of the petitioner under the mortgage in the quo warranto proceedings, we submit it is unconscionable that the petitioner residing in a distant state should be presumed nevertheless to have learned of the City's action against the Power Company, and now be held to have lost its rights as a result of the proceedings in the quo warranto case. This amounts to saying that the City by deliberately omitting to include the Trustee under the mortgage in the quo warranto case, nevertheless obtained the same rights against the Trustee that it would have obtained, if the Trustee had been included in those proceedings and had had its day in court therein, a proposition which has never heretofore had the sanction of any court.

5. Petitioner's Bill Should Not Have Been Dismissed in Any Event Without Affording Petitioner an Opportunity to Show That it Had no Knowledge of the Quo Warranto Proceedings Until After Final Judgment Therein.

In reaching a result based upon what it regarded as an important question in the case, namely, whether plaintiff had been negligent in not seeking relief in the state court

quo warranto case, we respectfully submit that the Circuit Court of Appeals should not have entered an order dismissing the bill, but in the interests of justice, should have remanded the case, with instructions to the District Court to receive evidence from both parties on the question as to whether petitioner had been guilty of any negligence barring relief in equity. The decision of the court below appears to go upon the basis that on the present record it may be presumed that petitioner had knowledge of the pendency of the quo warranto proceedings in time to have asked and obtained as a matter of right, leave to intervene therein, and that petitioner was negligent in not doing so. We think we have shown that petitioner would not have had any right to intervene, and that it would not have been guilty of negligence in not making any such attempt, even if it had possessed knowledge of the pendency of that action. However, since there is no suggestion either in the pleadings or the evidence that petitioner had any such knowledge prior to the entry of final judgment in the Supreme Court of Ohio, we respectfully submit that if this court should be of the opinion that such knowledge without an attempt to intervene would constitute negligence, then it is only proper and just to require that evidence be taken upon the point. To demonstrate that this would not be a futile proceeding, and that if the respondent had raised the point in the district court, such evidence could have been produced, and that it can still be produced, we secured affidavits from the various officers and counsel of the petitioner, who were in charge of the mortgage trust in its behalf, copies of which were appended to the petition for rehearing in the court below. (Affidavits, R. 628-638) They show that petitioner had no notice of the quo warranto action until in the summer of 1929, subsequent to the Supreme Court decision on June 12, 1929.

That a remand for that purpose on such showing would be a proper exercise of discretion, see—

Panama Mail S. S. Co. v. Vargas, 281 U. S. 670;

U. S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416;

Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167;

Columbus Gas & Fuel Co. v. Columbus (C. C. A. 6) 55 F. (2d) 56;

Wilson v. Spencer, (C. C. A. 5) 261 F. 357;

Lee v. State Bank & Trust Co., (C. C. A. 2) 38 F. (2d) 45.

6. The Circuit Court of Appeals Erred in Holding That This Suit is Merely an Attempt to Relitigate the Same Issues of Fact and of Law Which Were Present in the Quo Warranto Suit.

In view of the fact that the court below has assumed to treat this case as tantamount to an effort to review the proceedings in the quo warranto action in the State courts, upon the ground of error in the State Court decree, it becomes important to note the vital distinctions between the two cases and to analyze the State Court decision (although even if the issues of fact and law *were* identical, since the parties are different, the federal courts, as we have shown, are free to adjudicate the issues for themselves.)

Briefly stated, the case at bar was presented upon a widely different theory and a far different line of evidence from that employed by the Power Company in its defense of the quo warranto suit.

The applicable statute in effect during the period from 1887 to 1896, when the power company's predecessors were incorporated provided for an agreement between the city

and the utility as to the "mode of use" of the city streets.

The case at bar was presented upon the theory, that there was at all times an agreement as to the mode of use of the city streets between the Ohio Electric Power Company and its predecessors and the City (whereas the defense in the quo warranto suit was upon the basis that there was no evidence one way or another as to the agreement on mode of use); that the Company and its predecessors continued to observe the mode of use so agreed upon with the acquiescence and consent of the City at all itmes; that due to the expenditure of considerable sums of money upon the system in the City and the payment of taxes by the Company and its predecessor, of which the City received its proportion, the City was estopped to deny the existence of any agreement as to mode of use or the existence of the franchise rights; and that the passage of an ordinance by the City in 1924 regulating the use of the streets by the Company, as well as by other utiilties, with which the Company complied completely at the direction of the City, amounted at once to a modification of the mode of use and (if that were necessary) to a consent to the continued use of the streets by the City and an estoppel against the City from asserting that the Company was not using the streets with the Ciy's consent in a manner approved by the City. All of these vital elements and others were lacking in the presentation of the defense of the Ohio Electric Power Company to the quo warranto action in the state courts. (See more detailed analysis of the quo warranto decision, infra pp. 68 to 70).

Hence we maintain, that not only are the quo warranto decisions inapplicable here, but upon the vitally different record in this case, we would expect a decision from the state courts like that of the district court.

If, contrary to the foregoing analysis, the quo warranto decision is to be deemed a declaration of the State law of Ohio that the municipality and not the State had the power to grant the franchise and place limitations upon the same in point of time, such declaration is a reversal of the State law of Ohio, as declared in the earlier decisions rendered before the bondholders' money was invested in reliance upon the security afforded by franchises acquired under the State law of Ohio, as declared in the earlier decisions, and to prevent injustice and hardship, the Federal District Court was right, under the rule of this court, announced in *Gelpcke v. City of Dubuque*, and many other decisions, infra, in following the earlier line of cases. See the discussion immediately below.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE QUESTIONS AS TO THE EXISTENCE OF THE FRANCHISE RIGHTS AND PETITIONER'S INTEREST THEREIN SHOULD BE DETERMINED ACCORDING TO THE LAW OF OHIO AS ESTABLISHED BY ITS SUPREME COURT AT THE TIME THE MORTGAGE WAS MADE AND THE BONDS WERE ISSUED IN RELIANCE THEREON.

While the Circuit Court of Appeals recognized in its opinion that the quo warranto decree was not an adjudication against the petitioner, the effect of the decision of the court below by its denial to petitioner of a day in court is practically the same, as if the court below had held the quo warranto decision to be a reversal of the law of Ohio as previously declared by its Supreme Court in reliance upon which the rights of the petitioner and the bondholders were acquired, and had decided that the later decision of the state supreme court should be followed in passing

upon the questions as to the franchise rights, rather than the earlier decisions in reliance upon which petitioner's rights were acquired.

In so holding we respectfully submit that the court below erred i ntwo important respects: first, it should have determined the rights of petitioner and the bondholders according to the law of Ohio as established by its Supreme Court at the time the bonds were issued, which was prior to the quo warranto action; and, second, the effect of the decision by the court below is to impair the obligation of the franchise contracts and petitioner's contract made in reliance upon the franchise contracts, and results in the taking of petitioner's property without due process of law in violation of the Federal Constitution.

1. Petitioner is Entitled to Have its Rights Determined According to the Law of Ohio as Established by its Supreme Court at the Time the Bonds Were Issued, Which Was Prior to the Quo Warranto Suit.

At the time petitioner's predecessor, *The Equitable Trust Company of New York,* acquired its rights under the mortgage on May 25, 1925 and the bonds were sold, as the District Court correctly found, (as we expect to show infra), it had been definitely established in Ohio by an unbroken line of decisions by the State Supreme Court and by this court that electric light and power companies organized between 1887 and 1896 under the facts present in this case obtained from the State of Ohio valid perpetual franchise rights. (See discussion, pp. 50 to 70, infra.)

The decision of the Circuit Court of Appeals in refusing to consider the franchise questions operates to give the quo warranto decision conclusive effect as a judicial repudiation of the law of Ohio, as previously declared by its Supreme Court and by this court in cases brought up from

Ohio, in reliance upon which the bondholders represented by petitioner invested their money. That the result is to deprive petitioner of its vested property rights without due process of law is clear.

A change of law by judicial decision in effect depriving an investor of a contract or property right (which would be the result under the decision below) is as abhorrent to justice as such a change of law by legislative act, as was long ago announced by this court, in *Gelpcke v. City of Dubuque* (1863), 1 Wall. 175.

The hardship upon the bondholders who acquired their bonds in 1925 upon the strength of a clear cut line of applicable decisions of the Ohio Supreme Court is obvious, if their rights can be destroyed by a subsequent change of attitude upon the part of that court. Under such circumstances, as we understand the decisions, this court following the rule in the *Gelpcke case* has often reiterated that in a case where federal jurisdiction is present, federal courts should hold themselves free to decide what the state law was and to enforce it as laid down by the State Supreme Court before the contracts were made, rather than under the later decisions.

Moore-Mansfield Construction Co. v. Electrical Installation Company (1914), 234 U. S. 619:

> "Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, *such rights and obligations should be determined by the law as judicially determined at the time the rights accrued.* In every such case the federal courts, while leaning to the view of the state court as to the validity or interpretation of a law of the State, will exercise an independent judgment

and will not necessarily follow state judicial decisions rendered subsequently. Burgess v. Seligman, 107 U. S. 20, 33; Loeb v. Columbia Township, supra." (P. 625) (Italics ours).

Tidal Oil Company vs. Flanagan (1924), 263 U. S. 444:

> "* * * *In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions.* * * * In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law, *but where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was.*" (P. 452) (Italics ours)

And see also *Great Northern R. R. Co. v. Sunburst Oil & Ref. Co.* (1932), 287 U. S. 358, 364; 77 Law Ed. 153, 157.

The rights of the petitioner here clearly come within the category of intermediate transactions entered into upon the faith of the earlier line of cases, and we submit, are entitled to the protection of the federal courts, because the decisions in Ohio very clearly express the preference for the principle of forward operation, rather than that of relation backward, and particularly because it is necessary to do so to avoid injustice and hardship. *Thos. v. State of Ohio ex rel Gilbert*, 76 O. S. 341; *Lewis v. Symmes*, 61 O. S. 471.

2. The Effect of the Decision Below is to Impair the Obligation of the Franchise Contracts and Petitioner's Contract Made in Reliance Upon the Franchise Contracts, and Results in the Taking of Petitioner's Property Without Due Process of Law in Violation of the Federal Constitution.

As before stated the city council, on March 23, 1926 passed an ordinance requiring the removal of all of the equipment of The Ohio Electric Power Company from the streets of Norwalk (Plaintiff's Ex. 42, R. 445). On May 18, 1926 an ordinance was passed requesting the Prosecutor of Huron County to bring an action in quo warranto for the ouster of Ohio Electric Power Company (Plaintiff's Ex. 45, R. 449). The later ordinance did not refer to the earlier one which is still in effect.

Defendant has at no time denied its intention to enforce the ordinance of March 23, 1926 and it is obvious that it will undertake to proceed under that ordinance unless it is enjoined from doing so. Except for the injunction granted by the District Court, there is nothing to prevent the city from acting upon the ordinance of March 23, 1926 at any time it may see fit. Thus the effect of the decision below is to leave the city free to act under the ordinance.

While the respondent may take the position that the ordinance of March 23, 1926 taken in conjunction with the ordinance of May 18, 1926 exhibits only an intent upon the part of the city to follow orderly processes of litigation to determine the rights of Ohio Electric Power Company and therefore do not constitute laws impairing the obligations of contract, it is plain that these ordinances do not indicate an intention to follow orderly processes of litigation with reference to the rights of this petitioner and the bondholders represented by it, for none of them was ever made a party to the quo warranto litigation.

That the action of the Norwalk council in enacting these ordinances amounted to action by the state within the provisions of Section X, Article I of the Federal Constitution is clear. *St. Paul Gas & Light Company v. St. Paul,* 181 U. S. 142, 148; *Ross vs. Oregon* 227 U. S. 150, 163 and *Northern Ohio Traction Company v. Ohio,* 245 U. S. 574, 583, 584.

The respondent below took the position upon the basis of *Des Moines v. City Railway,* 214 U. S. 179, that the only threat of injury to petitioner's rights arose from the ouster decree. The Des Moines case was, of course, between the city and the utility and it was there held that the threat of judicial proceedings directed against the utility did not constitute action impairing the obligation of a contract so as to confer Federal jurisdiction. That case, as we understand it, did not decide whether such a threat would justify injunctive action on the merits. The Des Moines case, by reason of the vital difference in the two situations, we submit, is not controlling here. In *Cincinnati v. Cincinnati Traction Company,* 245 U. S. 449 an injunction was approved in the case of an ordinance providing for judicial proceedings because other means of action were not prohibited, just as in the case at bar the record shows forcible action and the further threat of the same by the city officials (R. 97, 106, 125, 126, 127, 155 and 156) and in *South Covington Railway Company v. Newport,* 259 U. S. 97 the Des Moines case was explained on the same basis. The vital difference is that the municipal legislation here involved did not contemplate any judicial action against the bondholders or their trustee. All proceedings have been directed solely against the Ohio Electric Power Company in disregard of the interests of the mortgagee and as far as it is concerned, the only action contemplated is direct and complete destruction of its property rights.

For the same reasons just stated we submit that the action taken and contemplated by the City, pursuant to the ordinances in question comes within the inhibition of Section 1 of the 14th Amendment to the United States Constitution against the taking of property without due process of law. *Postal Telegraph Cable Company v. Newport, supra; United Sheet and Tin Plate Company v. Hess, supra.*

IV.

PETITIONER'S MORTGAGOR, OHIO ELECTRIC POWER COMPANY, IS THE HOLDER OF INDEFEASIBLE FRANCHISES TO USE THE STREETS AND PUBLIC PLACES OF NORWALK, IN PERPETUITY WHICH ITS PREDECESSORS, THE INCANDESCENT LIGHT & POWER COMPANY, AND THE NORTHERN ELECTRIC COMPANY, RESPECTIVELY, DERIVED DIRECTLY FROM THE STATE OF OHIO BY INCORPORATION UNDER THE STATUTES IN EFFECT BETWEEN 1887 and 1896.

The foregoing statement of petitioner's fundamental position on the merits is based squarely upon the proposition that, under the statutes in effect from 1887 to 1896 The Incandescent Light & Power Company, and The Northern Electric Company, by their incorporations respectively in 1891 and 1895, each derived a perpetual franchise directly from the State of Ohio to manufacture and distribute electric energy for light, heat and power purposes in Norwalk and to use the streets and public places thereof, subject only as a condition subsequent to the making of an agreement with the City as to the "mode of use" of the streets and public places, or, in the event of any disagreement or failure to agree, to direction by the Probate Court as to the mode of use.

Petitioner further contends that the condition subsequent, as to the making and maintenance at all times of an agreement as to mode of use, has been and is now com-

pletely satisfied, so that the perpetual rights acquired have never been abandoned or lost and are not subject to divestment, and that petitioner's mortgagor is the holder of said rights (subject to the lien of petitioner's mortgagor) by reason of the various conveyances from its predecessors in title.

We understand the respondent City does not dispute the proposition that rights to use the streets and public places might be perfected under the statutes in effect from 1887 to 1896, but undertakes to defeat petitioner's fundamental proposition by making the following claims:

1. That the ordinance of October 7, 1890, whether considered as a franchise grant or as an agreement as to mode of use, was a valid contract binding upon the partnership, The Norwalk Incandescent Light Company, and its successors, which limited all rights in the city to a term of twenty years, so that the rights claimed expired in 1910.

2. That by the acceptance of the ordinance of October 7, 1890 the successors of the partnership, and therefore the petitioner, are estopped to claim present franchise rights in the city.

3. That the predecessor companies organized in 1891 and 1895, respectively, did not by virtue of their incorporations secure any vested rights to occupy the streets and public places; that there was nothing which could be construed as an agreement as to mode of use, unless it was the ordinance of October 7, 1890, which terminated all rights at the end of twenty years, so that the companies in question secured as part of their corporate franchises at most only the capacity or inchoate right to secure easements in the streets of the respondent City.

4. That the Act of April 21, 1896 (92 O. L. 204) revoked the capacities of the predecessor companies organized

in 1891 and 1895, respectively, to secure vested franchise rights in the city other than by grant from the city.

5. That the capacities of the predecessor companies organized in 1891 and 1895 to acquire franchise rights in the City were not assignable and so could not pass to their successors or to petitioner's mortgagor.

6. That the street lighting contract of April 13, 1905 terminated all rights of the predecessors of Ohio Electric Power Company upon the expiration of that contract August 31, 1915.

7. That the ordinance of July 1, 1924 was not an agreement with respect to the mode of use of the city streets.

All of these claims of the respondent City will be considered and disposed of in the course of our argument in support of the above stated fundamental proposition. It follows from what has been said that two questions, one principally of fact, and the other of law, are involved. The question of fact is whether or not an agreement as to the mode of use was made between the respondent City and the utility companies organized in 1891 and 1895, and if so, has there at all times been such an agreement between the various companies in the chain of title and the respondent City. The basic question of law is whether or not the companies organized in 1891 and 1895 secured state granted franchise rights in the respondent City which are immune to impairment by the City, with the further question as to whether or not anything has transpired to defeat or limit such franchise rights either by act or contract of any of the companies in the chain of title. Since the law questions involve the general nature of the rights arising under the statutes in effect between 1887 and 1896, they will be considered first. During the consideration of these questions it will be assumed that the 1890 ordinance constituted an

agreement as to mode of use, and that since its termination in 1910 there has at all times existed an agreement as to mode of use. The district court so held. (Memorandum Opinion, R. 232) The correctness of that holding will be demonstrated infra, pp. 71 to 83.

1. The Incandescent Light & Power Company and The Northern Electric Company Acquired Franchise Rights in Perpetuity From the State—the Ordinance of 1890 Did Not Limit These Rights.

The Act of January 26, 1887 (84 O. L. 7) made the provisions of Chapter 4 (Magnetic Telegraph Companies) of Title 2 (Corporations) of the Revised Statutes of Ohio applicable to electric light companies. We therefore set forth at this point the pertinent provisions of that chapter, and the Act of May 12, 1886, 83 O. L. 143.

Revised Statutes of Ohio 1880, Section 3454:

> "§ 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (50 v. 274, § 47.)"

Section 3454 granted to magnetic telegraph companies a state franchise upon any public road. The respondent City has suggested that the use of the term "road" indicates that this section was not meant to apply to streets of a municipality, but in view of the succeeding sections of the statute, and particularly Section 3461 and the cases construing them with reference to rights in municipalities, it is evident that the source of the grant whether involving locations within or without a municipal corporation is found in Section 3454.

Revised Statutes of Ohio 1880, Section 3461:

"§ 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, § 5.)"

Revised Statutes of Ohio 1880, section 3471:

"§ 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

While the foregoing sections of the Revised Statutes were in effect the first statute relating to electric light companies was enacted May 12, 1886, which was incorporated into Revised Statutes of Ohio 1890, Section 8752 (83 O. L. 143). This act as far as pertinent was as follows:

"(8752) § 1. Be it enacted by the General Assembly of the State of Ohio, that a company organized for the purpose of supplying electricity for power

> purposes, and for lighting the streets and public and private buildings of a city, * * * and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, *with the consent of the municipal authorities of the city*, village or town, and under such reasonable regulations as they may prescribe. * * *" (Italics ours)

While by the Act of 1886 the legislature expressly made the rights of an electric light and power company in a municipality dependent upon the consent of the municipal authorities, very shortly afterward the Act of January 26, 1887 was passed, by which the legislature reversed its policy with respect to electric light and power companies, and made the provision of the chapter on magnetic telegraph companies applicable to any company organized for the purpose of supplying light and power.

The Act of 1887 which was incorporated in the Revised Statutes of 1890, Section 3471a. is as follows:

> "Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies. (January 26, 1887, 84 v. 7.)"

The Act of 1887 continued in force until the Act of April 21, 1896 (92 O. L. 204) which amended Revised Statutes Section 3471a as follows:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. *Provided, however, that in order to subject the same to municipal control alone,* no person or company shall place, string, construct, or maintain any line, wire fixtures or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. * * *" (Italics ours.)

Thus under the Act of 1896 the legislature restored to municipalities control over future franchise rights of electric light and power companies within their boundaries, which control had been wanting in the period from 1887 to 1896. The line of demarcation drawn by the foregoing statutes clearly indicates that electric light companies incorporated thereunder during the years from 1887 to 1896 derived their rights to use the city streets direct from the state independent of municipal limitations. It is also quite

obvious that decisions of this court and of the Supreme Court of Ohio, with respect to the source and nature of rights derived by the incorporation of telegraph and telephone companies, under these statutes at any period during which they were in force, are of binding and conclusive effect in determining the source and nature of the rights acquired by the predecessor electric light and power corporations by virtue of their incorporation in 1891 and 1895, respectively.

What the powers and functions of the state and municipality were under the above statutes was first determined by the Supreme Court of Ohio in the leading case of *Zanesville v. Zanesville Telegraph and Telephone Company*, 64 O. S. 67, 59 N. E. 781 (1901) upon rehearing of the same case. The court's original and contrary conclusion is reported in 63 O. S. 442. This case involved the constitutionality of the provisions of Section 3461 in so far as jurisdiction was conferred upon the Probate Court, in that it was claimed to vest legislative power in the court. The telephone company's negotiations with the City Council for a mode of use agreement resulted in disagreement, and the company made application to the Probate Court to direct the mode of use. Thereupon that court held Section 3461 to be unconstitutional and dismissed the proceedings, which judgment was affirmed by the Court of Common Pleas but reversed by the Circuit Court. In coming to the final conclusion on rehearing that the statute was constitutional, the Ohio Supreme Court deemed it necessary to consider the general purpose and effect of the statutory provisions, and announced among others the following propositions of law in the syllabus and the opinion, which under the rule of *Palmer v. Zeigler*, 76 O. S. 210, 227, and *Republic Creosoting Company v. Boldt Construction Company* (C. C. A. 6) 38 F. 2d Series, 739, 740 are entitled to precedential weight.

1. "* * * It is competent for the State, through its legislative department, to grant to telephone and telegraph companies organized under its authority, the right to construct their lines in the streets of municipalities, * * *" (pp. 88, 89)

2. That corporations created under the above statutes "*when created* obtain from the state, franchises to construct and maintain their lines, from point to point, upon and along any public road or highway, * * * subject only to the limitation that the lines shall not be so constructed as to incommode the public in the use of the roads, and highways * * *" (p. 77). (Italics ours)

In other words, the right to *use* the streets is granted by the state—not by the municipality.

3. The only function of the municipality is to agree with the corporation as to the mode of use of the streets so that the public will not be incommoded in the use thereof. The court said, pages 80, 81:

> "* * * It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. *That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality.* It is only the *mode* of such use that becomes the subject of agreement or judicial determination." (Italics ours).

and at page 83:

> "* * * The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of the municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company."

4. The purpose of providing for an agreement by the municipality is only that the public shall not be incommoded, which appears from the quotation already given.

5. It follows indubitably from the language of the court that a municipality may not defeat or impair a franchise grant by the state by insisting upon unreasonable or arbitrary terms as to mode of use, or by limitation in point of time. The court said:

> "* * * The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by *bona fide* disagreement of the parties, a contingency not unlikely to occur; and hence, the necessity for the provision of section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties. (p. 82).
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> "* * * The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for that purpose, practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 of the Revised Statutes." (p. 89).

Farmer v. Columbiana County Telephone Company, 72 O. S. 526 (1905) presented this situation:

The City Council passed an ordinance presented voluntarily by one Thayer purporting to confer on Thayer and his assigns the *right* to construct a telephone system. The ordinance contained certain provisions for rates in the city and free connections with telephones outside the city, also to permit the use of poles for the city's fire alarm

boxes. The defendant company was incorporated under State law, and took an assignment of this ordinance and built the system. In this action, an individual and the City attempted to enforce by mandatory injunction the provision as to rates and free service. There was a cross-petition also by the city against the company setting up the claim of estoppel. The court very clearly held that the Council had no power to make the state granted rights contingent upon an effective arrangement as to rates and again declared that the right to use the streets comes from the State and that the power of cities is limited to agreement as to the mode of use. Part of the opinion is as follows:

> "* * * *A telephone company gets its right to go upon the streets, with its poles, wires, etc. from the state (sections 3454 to 3471-8 inclusive), and the power of the municipal authorities in the premises is to agree upon, not the right to use, but the mode of use,* and if no agreement as to mode shall be made within a reasonable time, the company may apply to the probate court, which court shall direct in what mode the line shall be constructed so as not to incommode the public in the use of the streets, etc. *In other words, municipal authorities may do what the probate court may do when a proper case is presented, and no other or different thing* * * * It follows that the council had no power to make an effective arrangement as to rates, and that the principal question will have to be determined against the plaintiffs in error." (pp. 531, 532). (Italics ours).

It should be noted that in the *Farmer* case the municipality passed an ordinance which was in form a franchise to an individual and his assigns, that it was assigned to a corporation and that the corporation nevertheless was held entitled to stand on the state granted franchise. In

the case at bar the same situation exists except that the 1890 ordinance ran to a partnership instead of an individual.

In *Queen City Telephone Company v. Cincinnati,* 73 O. S. 64 (1905), the court in holding that proof of complete corporate organization was a condition precedent to an action in Probate Court to fix the mode of use, discussed the nature of the right conferred by Section 3461 and approved the foregoing cases:

> "It is of course conceded as now well settled that the general power to occupy the streets of a municipality by a telephone company is derived from the state, as held in Zanesville v. Tel. Co. supra, and Farmer v. Tel. Co., 72 Ohio St. 526." (p. 81).

Macklin v. Home Telephone Company, 1 O. C. C. (N. S.) 373, affirmed without opinion, 70 O. S. 507, (1904). The defendant company in this case was organized under the telephone and telegraph statutes mentioned above, and then procured from the city an ordinance granting it the *right* to construct its system and fixing rates. Later, the Company increased these rates. The court held that the agreement as to rates was beyond the power of the City, pointing out that its control extended only to the agreement for mode of use. The court said:

> "• • • *The right of use of the streets and public ways by the telephone company is wholly beside and independent of the municipality, and, of course, is to be enjoyed like any other right, without let or hindrance from the municipality, except in the proper exercise of its police power* • • • Power to discharge the duty imposed by Section 2640, Rev. Stat., in connection with the construction of a telegraph or telephone plant is given by Section 3461, Rev. Stat., and is expressly limited to an agreement fixing the mode of use of the streets and public ways; • • •" (pp. 378, 379). (Italics ours).

In *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S. 428 (1916), the Ohio Supreme Court for the first time considered the applicability of these sections to electric light companies organized between 1887 and 1896, and held that such companies derived franchises from the state.

The predecessor of the defendant company in that case was incorporated in 1889, and in the same year, the Village Council passed an ordinance purporting to grant a franchise in the village streets for electric light and power purposes without limit in time. This ordinance also contemplated a street lighting contract and such a contract was made. That contract having expired, and the parties being in disagreement as to the terms of a renewal, defendant remand all street lighting equipment but continued to serve private customers. After the passage of the Act of 1896 (restoring control to municipalities) and without procuring the consent of the Village under that act, the company undertook to re-establish the public lighting portion of its system. The Village thereupon brought an action in injunction to require the entire removal of defendant from the Village. This relief was denied by the Common Pleas Court.

In the Court of Appeals defendant filed a cross-petition, stating that the Village had passed an ordinance for the purpose of repealing the ordinance of 1889 and prayed that defendant's property be protected. The Court of Appeals decided that a decree of ouster could not be rendered in the action, but did enjoin defendant. The substance of this injunction is paraphrased on page 435 of 93 O. S. Its exact scope is not clear, but apparently the Company was enjoined from erecting any additional equipment without the consent of the Village. Defendant, *basing its claims upon its state granted franchise*, appealed to the Supreme Court, which court affirmed the Court of Appeals,

not on the ground that the Village had the power to issue franchises prior to 1896, but upon the sole ground that the company had forfeited its right to use the streets for street lighting equipment by the removal thereof, and that this abandoned right could not be restored without the consent of the municipality after the Act of 1896.

The opinion throughout shows the rigid adherence of the State Supreme Court to the proposition that due to the act of 1887, from 1887 to 1896 franchises such as those obtained by the predecessors of the Ohio Electric Power Company to use the streets were derived from the state and not the municipality. We quote from the opinion:

> "*The plaintiff in error rests its case here on the broad proposition that the right to distribute electricity over the streets of the village emanates from the state and not from the municipality.* It is contended that the plaintiff-in-error and its predecessor were organized under the laws of Ohio, with all the powers and privileges granted to telegraph and telephone companies by Section 9170 et seq., General Code, and that therefore no village ordinance was necessary to make its rights effective, except such as related to the mode of use. (p. 436).
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> "It is contended by the plaintiff-in-error that Sections 9192 and 9193, General Code, confer upon electric light and power companies all of the powers conferred upon telegraph and telephone companies in the sections above referred to. (p. 438).
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> * * * * * * * *
>
> "* * * This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' *This was the state*

chise (March 4, 1889) which is involved in this case. of the law, at the time of the granting of the fran- Therefore, under the holdings in the cases cited, the grantee company derived its general power to occupy the streets from the state." (p. 439).

It is entirely clear from this language that the claim of a state granted franchise involved in the case at bar is the same as that asserted and sustained in the *Hardin-Wyandot* case.

It is significant to note that in 1917 Mr. Craig (then representing a predecessor of Ohio Electric Power Co.), now of counsel for the respondent City, in his letter to Mr. Ginn (Plaintiff's Exhibit 77, R. 480, 483) expressed the same view of the *Hardin-Wyandot* case, which is herein set forth.

Except as to the issue of abandonment there involved the *Hardin-Wyandot* case is highly analogous upon its facts to the case at bar. In that case the predecessor corporation received from the municipality what purported to be an ordinance grant without limitation in point of time. In the present case the predecessor corporations received assignments of an ordinance purporting to be a grant limited to 20 years, originally granted to the partnership formed in 1890 but running to its successors and assigns. While the statement of facts at page 429 of 93 O. S. speaks of a municipal franchise granted in 1889, it is plain from the language of the opinion quoted above that the company based its rights solely upon the state grant arising by reason of the incorporation of its predecessor, and that the court gave effect thereto.

The decision in the *Hardin-Wyandot* case did not give effect to the ordinance of 1889 as a franchise. It was the failure to comply with the Act of 1896 after prior abandonment of the street lighting rights which formed the basis

of decision restraining the Company from reinstating its street lighting equipment as appears from the opinion.

> "In this posture of the case, while *in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights,* still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law." (pp. 442, 443). (Italics ours).

It is, of course, clear that the "existing law" to which the court referred was the Act of 1896.

The above quoted language necessarily recognized and established the Company's right to continue the operation of its private lighting system without municipal interference, based squarely upon the statutes, and not upon the ordinance, as the City of Norwalk argues.

The case was affirmed by this court in 251 U. S. 173. (Decided December 15, 1919). That the interpretation employed in the decision of this Court was the same as that of the State Supreme Court, and that it expressly recognized the right of the company to maintain its private lighting system without further consent from or interference by the municipality appears from the following statements in the opinion at page 177:

> "* * * There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that *both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such, that a decree annulling such rights as the*

company had then retained in the streets could not properly be entered in the cause.

* * * * * * * *

"From this state of the record we conclude that the state Supreme Court did not intend to deal with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction 'until the consent of said village shall have been obtained,' and so restrained its judgment will be affirmed, * * *" (Italics ours).

The foregoing disposes of any claim by the respondent city that the *Hardin-Wyandot* case supports respondent's contentions. We think it is plain that the decision of this Court in the *Hardin-Wyandot* case would have been otherwise had the State Court decree attempted to deal with the company's commercial lighting equipment in the streets.

It is also true that these rights, being unlimited as to time, were granted in perpetuity. *Hardin-Wyandot Lighting Company v. Upper Sandusky, supra; Northern Ohio Traction Company v. Ohio,* 245 U. S. 574; *Ohio Public Service Company v. Ohio* Ex Rel. Fritz, 274 U. S. 12.

It necessarily follows that the twenty-year provision of the ordinance of October 7, 1890 did not and could not limit the right to use the streets of Norwalk. The City had nothing to give or withhold as to term and was without power to shorten the period of the State granted right.

The respondent City took the position in the court below that mere incorporation under the statutes in effect from 1887 to 1896 conferred nothing more than an inchoate right of eminent domain, or put in another way—the right to acquire franchise rights, or reduced to lowest terms, that

the companies got only the right to be that kind of a corporation. The cases already considered are sufficient to exhibit the utter fallacy of any such argument, which springs from a confusion between rights and their exercise. That the franchise rights might be lost by waiver or non-user may be conceded, but that the rights in issue in this case have always been used under appropriate agreement as to mode of use will be amply demonstrated infra.

Respondent's actual contention is that under the ordinance of October 7, 1890 the rights in the streets were limited to twenty years. Reliance for this claim is based upon a line of cases construing statutes patently dissimilar to the statutes here under consideration. The statutes in the cases relied upon by the respondent City below all provided that the utility could enter upon the street *only with the consent* of the particular municipality, or were cases where the city *had the absolute right* to fix terms and conditions for the use of its streets.

The obvious points of distinction is that in such cases the particular city could absolutely prevent the utility from entering upon its streets unless the utility agreed to do so upon its terms, while under the Ohio statutes here involved, the city could not prevent the exercise of the right, nor could it limit the same in point of time. The attempt may be made to reconcile such cases with the situation at bar upon the ground that the right to fix "terms and conditions" is the same as the right to "agree upon the mode of use." Obviously the right to fix "terms and conditions" is much broader than an option to agree upon "mode of use," the first being tantamount to the power to exclude, while the latter is not. Moreover, any such contention necessarily ignores the fact that the statute providing for agreement as to the mode of use conferred no absolute rights or powers upon municipalities, but in the event of

failure to agree provision was made for resort to the Probate Court *to direct the mode of use.*

We come now to the decisions in the quo warranto case against the Ohio Electric Power Company. The opinions of the Court of Appeals and Supreme Court appear in 35 O. App. 481, and 121 O. S. 235, respectively. Because of the implicit reliance of the respondent City upon those decisions, it is important to analyze them to see what the State Courts did decide and what they did not decide.

The State Courts did not decide that a state granted franchise acquired by incorporation under the laws existing from 1887 to 1896, followed by an appropriate agreement as to mode of use, could be or was limited in point of time by the twenty-year provision of the 1890 ordinance. *They simply concluded that the State granted right had never been made effective by any agreement as to modeof use.*

Neither did they decide that a corporation organized in the period above mentioned could not take franchises concurrently from the state and from the municipality, or that having done so they could not rely upon the larger grant, namely, the perpetual state franchise, unaffected by any time limitation in the municipal grant. The conclusion of the State Court that the state granted franchises never became effective by any agreement as to mode of use, no doubt resulted from the vital difference in facts between the presentation of the defense by the Power Company to the quo warranto suit and the case of the plaintiff in the suit at bar.

The present case was presented upon a widely different theory and a far different line of evidence from that employed by the company in its defense to the quo warranto action. The briefs in the State Supreme Court in the quo warranto suit show that *the company presented its case upon the assumption that no agreement as to mode of use*

had ever been made. We quote from its brief at page 22:

> "There is no evidence in this case of any agreement or any disagreement on the mode of use. The outstanding feature is that the Company occupied the streets and did business without any regulations by the municipality, and without any protest as to the mode of use of the streets."

The contentions made and evidence offered by the plaintiff herein are exactly contrary to the company's position in the State Courts. We shall hereinafter show that the evidence submitted by the plaintiff in the present proceeding was amply sufficient to sustain the Federal District Court in deciding in favor of the plaintiff on the ground that there *was* an agreement as to mode of use. The record here is so different from that in the State Courts as to make their decisions inapplicable here. On the record and contentions here made we would confidently expect a decision from the State Courts in harmony with that of the District Court.

The fact that the ordinance of 1890 could have validity but for one purpose, namely, to constitute upon acceptance an agreement as to mode of use, was never suggested to the State Courts. The detailed regulatory ordinance of July 1, 1924 and the uniform compliance (*infra* pp. 89 to 92) therewith by the company, are facts which were not even in evidence in the quo warranto suit. Also in that action the company's rights were based only upon the incorporation of the Northern Electric Company in 1895, the earlier incorporation of The Incandescent Light & Power Company in 1891 being disregarded. No attention was paid to the fact, that the council of Norwalk was informed that the partnership intended to incorporate, and that the council then made the ordinance run to the partnership's successors and assigns.

We therefore submit that the quo warranto decisions by the State Courts furnish no support for respondent's position. If, contrary to our analysis, the quo warranto decisions are to be deemed a reversal of the previously settled law of Ohio that corporations, such as the company's predecessors, acquired franchise rights from the State, then, as already pointed out, the District Court was correct in following the earlier decisions under the rule of Gelpcke v. City of Dubuque and many other decisions of this court, supra.

Summarizing and applying the law to the case at bar: the franchises in question were acquired between 1887 and 1896 at which time no Ohio case had contained a suggestion that such a franchise without time limit was revocable at will. This was clearly pointed out in *Northern Ohio Traction Company v. Ohio*, 245 U. S. 574, 584, and was reaffirmed in *Ohio Public Service Co. v. Ohio, ex rel. Fritz*, 274 U. S. 12. Furthermore, at the time petitioner's predecessor, The Equitable Trust Company of New York, acquired its rights under the mortgage in May, 1925 it had been definitely established in Ohio that such franchises were derived from the State. *Zanesville vs. Zanesville Telegraph & Telephone Company*, 64 O. S. 67 (1901); *Farmer v. The Columbiana Telephone Company*, 72 O. S. 526 (1905) *Queen City Telephone Co. v. Cincinnati*, 73 O. S. 64 (1905); and *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S. 428 (1916), 251 U. S. 173. That the franchises were perpetual had been settled for Ohio by the decision of this court in *Northern Ohio Traction Company vs. Ohio*, 245 U. S. 574 (1918).

2. The Franchise Rights Acquired Are Incontestable—The Provisions of the Statutes Have Been Satisfied—An Agreement as to the Mode of Use Between the City and the Predecessors of the Ohio Electric Power Company Was Made in 1890 and Has Always Been Expressly Or Impliedly Kept In Force, Although Since Modified By The Ordinance of 1924.

Section 3461 Revised Statutes of 1890 provided:

> "The mode of use shall be such as shall be agreed upon between the municipal authorities * * * and the company * * *".

but did not prescribe any specific way in which such agreement should be reached or evidenced. *An agreement however reached and however evidenced satisfies the statutes.* It is plain upon the record in this case that this requirement of the statute has been met and fully performed: first, by the passage and acceptance of the Ordinance of October 7, 1890; second, even if that ordinance did not constitute such an agreement, an agreement must be implied from the acts of the parties during the entire period up to the present time; third, the defendant is estopped from denying the existence of an agreement as to mode of use; fourth, by the ordinance of July 1, 1924, and the company's compliance therewith.

(a) The Ordinance of October 7, 1890, was a Tender by the City Which by Acceptance Became an Agreement as to Mode of Use.

This ordinance, which has been set forth in full at pages 7 & 8, purports to grant what is called a franchise to a named partnership, its successors and assigns, for a period of twenty years, and then prescribes the mode and manner in which the electric lines shall be constructed and maintained upon the streets of Norwalk. We maintain that the ordinance was ineffective and void as a grant of a franchise; that it should be construed as a legal enactment, if

possible, and it can only be regarded as legal if treated as an agreement or tender of agreement for mode of use; and that the language of the ordinance, together with the surrounding circumstances, easily demonstrate that it was intended so to be.

(1) The Ordinance of October 7, 1890, was Ineffective as a Franchise Grant.

1. It is well settled in Ohio, as elsewhere, that municipal corporations (prior to Constitutional Amendment in 1912) had only the powers expressly conferred upon them by the legislature.

Billings vs. Railway Company, 92 O. S. 478, p. 482;

> "Under the constitution, previous to the amendment in 1912, municipal corporations in their public capacity possessed such powers, and such only, as were expressly granted by statute and such as might be implied as essential to carry into effect those which were expressly granted. Ravenna v. Pennsylvania Co., 45 Ohio St., 118."

This rule applies especially to public utility franchises: *Raynolds v. Cleveland,* 14 O. C. D. 215.

See also *Ampt. v. Cincinnati,* 21 O. C. C. 300, and for cases from other jurisdictions exhibiting the general rule see: *Worcester vs. Worcester Ry.,* 196 U .S. 539; *Chelsea vs. Treasurer,* 237 Mass. 122, 130 N. E. 397; *McAneny vs. Board of Estimate,* 232 N. Y. 377, 134 N. E. 187; *Elliott vs. Mongahela City,* 229 Pa. 618, 79 Atl. 144; *McQuillan Municipal Corporations,* 2d Ed. Section 1749.

An examination of the statutes in force in 1890 fails to reveal any general provision conferring power upon a municipality to grant an electric light franchise to either corporations or individuals. The only enactments having any relation to the subject are the Act of May 12, 1886, and Section 3471a, R. S. 1890 (Act of January 28, 1887). Sec-

tion 3471a was a part of the corporation chapter and obviously had no relation to partnerships. The Act of May 12, 1886 did, so long as it was in existence, confer upon the municipalities the right to grant franchises to *organized companies*. This act was repealed by implication upon the passage of the Act of 1887. (Section 3471a, R. S. 1890). On this point it is said in *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S., 428:

> "This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies'." (p. 439).

The quoted language cannot be regarded as dictum. *Eisner vs. Macomber*, 252 U. S. 189, 205, and a review of the history of statutes covering franchises to utility companies further demonstrates the correctness of such conclusion. At all times the Ohio Legislature made franchises subject either to municipal consent or free from it. At no time from 1852 to 1896 did concurrent sources of franchise rights exist. The Act of 1887 set up a procedure in direct conflict with that of the Act of 1886 and their co-existence would have been entirely out of accord with all previous legislative policy.

2. Aside from constitutional or statutory law as to the rights of a municipality, it has been expressly decided that a municipality does not have any general or implied power to grant electric light and power franchises.

Brush Electric Light Co. vs. Jones Brothers Electric Co., 5 O. C. C. 340 (1891) (Affirmed by the Ohio Supreme Court, 21 W. L. Bull., 72 (1893). In deciding this case the court said:

"* * * The ordinance of the city council, granting to it the right to erect and maintain in the streets, avenues, alleys and public ground of the city, poles and appurtenances necessary for furnishing light by means of electricity, was passed March 3, 1882. At that time there was not, nor until May 12, 1886 (83 Ohio L. 143) was there any statute of the state, which expressly conferred upon the municipal authorities of a city the right to make such a grant—and we are of the opinion that in no one of the clauses of section 1692, Revised Statutes, which is the general statute pointing out and enumerating the powers granted to municipal corporations, or by the provisions of sections 2492 ,or 2640, to which our attention has been called by counsel for the plaintiffs is any such power conferred, *even by implication. The clear doctrine of the law is, that municipal corporations have such powers only as are expressly conferred by the legislature, 'and those which are necessarily or fairly implied in; or incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable'.*" (pp. 341, 342).

The Act of 1886 which conferred upon municipalities authority to grant franchises to electric light and power companies, having been repealed by the Act of 1887, no such authority was in existence until it was restored by the Act of 1896. The *Brush* case, involving an ordinance situation prior to 1886, is therefore most potent authority for the proposition that a city did not have authority concurrently with the state to grant franchises to electric light and power companies in 1890.

Respondent, of course, takes the position that the ordinance of 1890 was a valid enactment conferring a franchise upon the partnership, and that the power to grant the fran-

chise was derived from the city's general control of the streets.

Respondent placed its chief reliance in the courts below in the case of *Kinsman Street Railway Co. vs. Broadway R. R. Co.*, 36 O. S. 239 (1880), but the distinction clearly appears from the opinion in that case that the street railway involved therein was organized under the Ohio Corporation Act of 1852, and that under specific provisions thereof the railway company was bound to observe *the terms and provisions* imposed by the city. Hence it is evident that the *Kinsman* case furnishes no support for any claim by the respondent city that in 1890 it could grant electric light franchises by virtue of its general powers over its streets.

Respondent also relied below upon certain cases in the United States Supreme Court coming from Ohio and involving franchise ordinances. *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574, involved a street railway franchise granted by county commissioners. Admittedly, the local authorities had the power to act under a directly applicable statute. In neither of the other cases, *Hardin-Wyandot Co. vs. Upper Sandusky*, 251 U. S. 173, and *Ohio Public Service Co. vs. State*, 274 U. S. 12, which were also relied upon by respondent, as we understand them, did this court consider the general power of a municipality apart from statutory authority.

An analysis of the *Ohio Public Service* case shows that it does not support the proposition urged for it by respondent, namely, that a municipal ordinance like that of October 7, 1890, constitutes a binding contract. It is quite apparent that the decision did not turn upon that question, but upon the issue as to whether the rights, whatever they were, were assignable in 1907, in view of the provisions of the Act of 1896. At page 333 of 113 O. S. the court said:

> "It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable."

The court then decided (pp. 336 and 337) that whether the rights were considered to be a state or municipal franchise, they were not assignable in 1907 without the consent of the state. The court, however, recognized that state granted rights were involved by saying at page 337:

> "* * *The rights acquired by the Orrville Light, Heat & Power Company from the state in 1893, under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the village of Orrville, nor by the State of Ohio, after the passage of the amendment of 1896."

The applicability of the foregoing language to the case at bar is completely demonstrated when it is taken into account that the Orrville Company was organized in 1893 and then succeeded to the rights acquired by two individuals under an ordinance in the form of a grant by the Village in 1892, the facts thus being the same as in the instant case. The company claimed in that case exactly as petitioner does here, that the incorporation in 1893 constituted a grant from the State of Ohio, which taken with the ordinance of 1892 created and fixed rights which the Village had no power to disregard.

The State Supreme Court obviously thought it was proceeding in harmony with the *Hardin-Wyandot* case, supra, from what was said at page 338 of the opinion, but seemed to feel that the facts were different because the question of assignability was not raised in that case. When

this court came to review the *Ohio Public Service* case, (274 U. S. 12) it was concerned solely with the question of assignability of the rights as determined adversely to the company in 113 O. S. 325. It is not evident that its decision turned upon the question as to whether or not there was a state granted franchise, but that this court simply held consistently with *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574, that the franchise rights, which the State Supreme Court had found existed, were not subject to termination at the mere will of the city, and that if the statute of 1896 were construed to sustain such a right to terminate the franchise, it was in conflict with the contract impairment clause of the federal constitution. The result in this Court would have been the same whether or not the franchise was from the state or the municipality, we submit, so it was wholly unnecessary for this court to go into the question of the source of the franchise. That the same distinction applies to the *Hardin-Wyandot* case, we have already pointed out (supra p. 64).

Furthermore, if the city had full power to grant a franchise by the ordinance of October 7, 1890, then there was no reason why either the act of 1886 or that of 1896 should have been passed by the state legislature.

Respondent of course relies upon the opinions of the state courts in the quo warranto case. We have already pointed out why those decisions are not controlling, (supra. pp. 68 to 70). Furthermore, both of the courts in that case found that a partnership could not obtain a state franchise in 1890 and concluded that the rights acquired were of municipal origin. Those courts entirely overlooked the question of whether municipal power existed, probably because the point was not very seriously presented.

(2) The Ordinance of October 7, 1890, Constituted an Agreement for Mode of Use.

This ordinance being ineffective for the purpose of granting a franchise, we maintain that it should be regarded as an agreement for mode of use, as was done by the trial court.

It is well established that where a city ordinance may be given two constructions, one of which will make it invalid and the other valid, the latter construction should be followed if at all reasonable, 43 C. J. 570; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546.

The city council was aware in advance that the partners intended to form a corporation; they knew that the ordinance ran to successors and assigns of the partnership; and they knew of the transfer of all its property to the corporation formed in 1891 (R. 61, 62). The language of the ordinance when read with the facts just stated, it seems to us, leaves no question that our view as to its nature is correct.

Assuming that the Village Council meant to act legally, the ordinance is entirely consistent with such view. It contains all of the necessary provisions as to the manner in which the wires and poles were to be constructed and maintained. The absence of greater detail as to the mode of use in those early days of the electric light and power business is not surprising, and it is nevertheless quite apparent that the ordinance laid down certain standards and required construction and maintenance of the company's equipment to be along definite lines. The mere fact that a limitation of twenty years was expressed does not necessarily mean that a franchise was being granted, but rather as a matter of reason that the council felt that it should not attempt to agree at that time as to the mode of use for a period greater than twenty years.

It has been demonstrated by the decisions discussed above in the cases of *Zanesville vs. Zanesville Telegraph and Telephone Co.*, 64 O. S. 67; *Farmer vs. Columbiana County Telephone Co.*, 72 O. S. 526, and *Queen City Telephone Company vs. Cincinnati*, 73 O. S. 64, that between 1887 and 1896 the sole function of municipalities was to agree upon mode of use, and that they could not thereby either prevent the securing of perpetual franchises or impair the perpetual character thereof by entering into invalid agreements with utilities companies as to rates, failure to agree, or by plain rejection of the overtures of such company looking to agreement. Plainly under Sec. 3461, Rev. Stat. 1890 and the cases cited above in this paragraph any provision requiring the surrender of a state granted franchise after 20 years as consideration for an agreement as to mode of use would have been invalid as an illegal attempt by the municipality to exact compensation for the use of the streets. Thus, assuming, as must be done, that the Norwalk Council meant to act legally, the only deduction possible is that in passing the 1890 ordinance the Council did so by way of exercising its only function, namely that of agreeing upon mode of use.

We find strong support for our view in the very words of present counsel for the respondent City. Several of the attorneys now representing the respondent represented its interests in the quo warranto suit against the Ohio Electric Power Company, and in the brief which they filed with the Supreme Court of Ohio in that case at page 28 thereof, with reference to the ordinance of October 7, 1890, they said:

> "* * * That ordinance prescribed the '*mode of use*' by the persons or company operating the electrical equipment. * * *"

That the agreement became complete by acceptance cannot well be denied, for both the District Court below (Memorandum Opinion, R. 212, 231) and the Supreme Court of Ohio so found. The latter court in its opinion affirming the decision of the Court of Appeals ousting the Ohio Electric Power Company from the streets of Norwalk expressly says with respect to the grant by the municipality to the partnership:

> "* * No written acceptance was provided for, nor shown in the record, but it does appear that the ordinance was enacted upon the application of the partnership, members of which attended the meeting of council and personally accepted the grant, and thereupon the grantees entered upon, and thereafter the company which took over the property of the partnership continued to operate, the plant and lines constituting the only lighting system then existing in the City of Norwalk." (121 O. S., 237).

Since the ordinance in terms dealt with the mode of use, since it has been expressly found that the grant was accepted, since it was to the partnership, *its successors and assigns*, and since its successors and assigns have conducted themselves in accordance therewith, (R. 70, 77, 78, 84, 94, 95, 128-130), and the term stated in the ordinance was twenty years, we do not see how it is now open to question, that there was an agreement under Section 3461 Revised Statutes 1890 as to the mode of use which continued at the very least for a period of twenty years from 1890.

There is nothing novel about this construction of the ordinance. In *Farmer vs. Telephone Co.*, 72 O. S. 526; *State, Ex Rel. Matthews vs. Central Union Telephone Co.*, 14, O. C. C. 273; and *Macklin vs. Home Telephone Co.*, 1 O. C. C. (N. S.) 373, all discussing such ordinances purporting by their language to grant a franchise right, the ordinances

were treated only as mode of use agreements, as was done also in the case of *Hardin-Wyandot Company vs. Upper Sandusky*, supra.

In like situations city ordinances were held void in so far as they attempted to grant franchise rights which the municipalities were powerless to convey, but valid in so far as they related to mode of use, and further, that they did not constitute a waiver of rights acquired under state legislation or any estoppel against the companies to claim the state granted rights. *Iowa Telephone Co. vs. Keokuk*, 226 Fed. 82, 99, 100, (D. C. Iowa); *Northwestern Telephone Exchange Co. v. Minneapolis*, 81 Minn. 140, 86 N. W. 69, 74.

The further question arises as to when, if ever, there came a disagreement between the City and the Ohio Electric Power Company, or any of its predecessors as to mode of use.

Although the Ordinance of 1890 expired by its terms in 1910, it must be said that its provisions as to mode of use continued in effect until some affirmative action was taken by either of the parties. It is clear from the record that after 1910 the various companies continued to operate and to observe the mode of use originally agreed upon and later modified by the ordinance of 1924 with the full knowledge and acquiescence of the city. It has often been held that after the expiration of a franchise grant the utility continues to have a lawful right to use the streets until the municipality takes affirmative action. The utility is not regarded as a trespasser.

Denver v. Denver Water Co., 246 U. S. 178;
Hill v. Elizabeth City, 298 Fed. 67, 69. (C. C. A. 4);
Doherty & Company vs. Toledo Railways & Light Company, 254 Fed. 597, 601 (N. D. Ohio, W. D.);
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, 91 N. W .1081, 1090.

Certainly the same rule should apply where the city does not confer the right to use, but merely agrees as to the mode of use. Accordingly, the mode of use agreement provided for in the Ordinance of 1890 continued in force until the electric light ordinance of July 1, 1924, which contained new regulations as to manner of use which were enforced by the city and complied with by the company. That ordinance with its detailed provision as to the mode of use of its streets and the careful compliance by the Ohio Electric Power Company therewith ever since demonstrates, we think, conclusively that there never was a disagreement as to mode of use.

(b) Regardless of the Ordinance of 1890 an Agreement as to Mode of Use Has Always Existed.

Even if it be held that the Ordinance of October 7, 1890 cannot be regarded as an agreement for mode of use within Section 3461, nevertheless we respectfully submit that the parties were at all times in agreement as to the mode of use. Section 3461, Rev. Stat. 1890, did not specify the kind of agreement (as is pointed out by the Ohio Supreme Court, quo warranto case, 121 O. S. 235) and in the absence of a requirement that this agreement be in the form of an express written instrument, an agreement by implication should be sufficient. Such is the general rule applicable to similar situations. Dillon on Municipal Corporations, Page 1947:

> "• • • No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision and in such case it has been said that so far as the Constitution is concerned, such consent may be either express or implied. And it has also been held that the consent of the municipality required by statute *may be presumed* where the streets of the municipality

> have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them."

If such a rule applies to a case where consent is required, it would certainly apply where the power of the municipal authorities relates only to the mode of use, and such is the law of Ohio *State Ex Rel v. Central Union Telephone Co.*, 14 O. C. C. 273. This case has been discussed before and as we then pointed out, the court held that a telephone company could not be ousted from the streets until it was shown that the parties had failed to agree upon the mode of use.

An examination of the record in this case will show that from the time The Incandescent Light & Power Company occupied the streets of Norwalk in 1891, the city and the operating company were never in dispute as to the mode of use. All laws and ordinances as to the maintenance of the system were complied with and whenever any changes were contemplated the company secured the approval of the city authorities. (R. 70, 77, 78, 84, 94, 95, 128-130). Although various disputes arose from time to time, it does not appear at any place that these disputes related to the mode of use. The city at no time demanded an express agreement or a new agreement of any kind.

(c) The Defendant is Estopped From Denying the Existence of an Agreement as to Mode of Use.

While we do not believe that the City could limit its agreement as to the mode of use to 20 years, for the purpose of discussion of the question of estoppel we may assume that this agreement as to the mode of use expired under the 1890 ordinance in 1910.

That, then, presents the question as to whether or not the city can now assert that there has been no agreement

between it and the power company and its predecessors as to the mode of use of the streets since 1910.

Taking the case most favorably for the city, it is only an express agreement as to mode of use which has been lacking since 1910, although we think there has been an express agreement since that time. To date the city has given no notice whatsoever that it will require a new agreement, except the 1924 ordinance, with which the Company has complied. Instead, it has taken a position which must involve a claim that it may oust the company without even notifying it that a new agreement as to the mode of use is desired by the City. Such a position seems clearly wrong. *State ex rel vs. Central Union Telephone Co.*, 14 O. C. C. 273. Even construing the ouster ordinance of March 23, 1926 (Plaintiff's Ex. 42, R. 445), as including a demand for a new agreement, (which we submit, it clearly does not), the time given, that is thirty days, was unreasonably short, for thirty days would probably be an inadequate time in which to attempt an agreement and prepare an application to probate court, even failing to take into consideration the time which would be necessary to move the company's equipment.

That such a reasonable time must be given is held in *State, ex rel vs. Telephone Co.* 14 O. C. C. 273, where it appears that the telephone company had a permit to use the streets for ten years. After the expiration of this period negotiations were carried on for two years without any agreement being reached, th city attempting meanwhile to regulate the rates. The city then filed a petition for ouster. It was held that the city had no right to compel ouster until it was shown that no agreement could be reached, and that the company had delayed an unreasonable length of time in applying to probate court. Because of the failure to make such a showing the action was dismissed.

The foregoing discussion has been based upon the assumption that the ordinance of 1890 amounted to an agreement as to mode of use. The situation may even be considered upon the basis that this ordinance was of no effect whatsoever, with the result that the company and its predecessors have been operating in the City of Norwalk for some forty-two years, or thirty-six years to the beginning of the ouster procedings, without any express agreement with the City as to mode of use, but that during all of this time these companies have operated in the City, they have installed their poles on public streets with the full knowledge of the city authorities. (R. pp. 70, 77, 78, 84, 94, 95, 128-130), have expended large sums in the installation, extension and improvement of this system (R. pp. 78, 94), have permitted the joint use of their poles by the city (an ordinance authorizing such joint use having been passed after the date when the city claims their rights ended, Plaintiff's Exhibit 37, R. 436), and that they have paid taxes upon this system of which the municipality has received its share annually over the period 1911-1929. (Stipulation, Plaintiff's Exhibit 1, R. 279, 280). And it further appears that at various times down to 1915 the City contracted with them for the furnishing of electric light and power. (Defendant's Exhibits G & H, R. 87, 534, 541).

Obviously up to the time that the Norwalk properties were acquired by the Ohio Electric Power Company and the bonds were issued and sold based upon the security of those properties, the City of Norwalk had never asserted that an agreement as to mode of use did not exist. Upon the faith of the fact that the operation of the predecessor companies over the entire period in question had been notorious and under a claim of right, and that no objection thereto had

ever been asserted by the City, the Ohio Electric Power Company acquired the properties and the bondholders represented by the Trustee petitioner expended their money.

On these facts it is submitted that the City is estopped to say that during all these years the companies were operating contrary to its will.

That an estoppel may operate against a municipal corporation is held in *Boone County vs. Burlington & Mo. River R. R. Co.*, 139 U. S. 684, and in *Louisville vs. Cumberland Telephone & Telegraph Company*, 224 U. S. 649, this was applied to a franchise case. In this case the city repealed a franchise ordinance after the company had spent largo sums in installation and improvement of its system. One of the grounds urged by the city was that the original franchise ordinance was not a valid one. This court said.

> "With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (Boone County v. Burlington & M. R. R., 139 U. S. 684, 693) from claiming that the ordinance was inoperative and it also prevented the Council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company." (p. 662).

Among a multitude of authorities clearly establishing an estoppel against the City of Norwalk upon the facts of this case are:

Atlanta vs. Gate City Gas Light Co., 71 Ga. 106;
Bradford vs. New York & P. Telephone & Telegraph Co., 206 Pa. 582, 56 Atl., 41;
Spokane St. Ry. Co. vs. City of Spokane Falls, 6 Wash. 521, 33 Pac. 1072;
Dillon on Municipal Corporations, Page 1947;
Town of Newcastle vs. Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516.

In the case of *Atlanta vs. Gate City Gas Light Co.*, supra, the corporation was created by the state, and the court held that it had a right to install mains without the consent of the city. Furthermore, it was pointed out that an estoppel arose against the city in the following pertinent language:

> "But apart from all these considerations, the city of Atlanta has stood by and seen this company make an outlay of $140,000 in the exercise of their rights under this charter, without intimating to them that objection would be made to their use of the streets for the purposes authorized, and without the use of which their enterprise would not have been undertaken and could not be prosecuted, and without which they would lose their entire outlay and be involved in irretrievable ruin. Upon every principle of equity this failure to notify the complainant of their intention until this heavy expenditure had been made, would estop them. Such conduct is fraudulent in the eye of the law, and where practiced upon an innocent party, who is seeking bonafide to carry out the provisions of its charter by availing itself of

the powers and privileges thereby granted, would, if anything could, debar them from now being heard * * *" (pp. 125-126).

And see:

State of Missouri, ex rel vs. Missouri Utilities Company, 53 S. W. (2d Series) 394 (Supreme Court of Mo.)

The record shows that during the years from 1910 to 1930 taxes were assessed by the proper authorities of Ohio upon the real and personal property of Ohio Electric Power Company and its predecessors in Norwalk, were paid by the company and its predecessors, and *the City of Norwalk received its share, based upon a certain tax rate per thousand in the City of Norwalk, Ohio, of all taxes collected upon said real and personal property located in the City, which tax money it received as a result of the continued use of its streets,* (with the City's knowledge) by the company's lines and poles (Stipulation, plaintiff's Exhibit 1, R. 279-280). That assessment and collection of taxes is a strong element of estoppel against the city has been recognized time and again.

Old Colony Trust Co. v. City of Omaha, 230 U. S., 100, 101.

Spokane St. Ry. Co. vs. Spokane Falls City, 6 Wash. 521, 33 Pac., 1072;

Commercial Electric Light & Power Co. vs. City of Tacoma, 17 Wash. 661, 50 Pac., 592, 593, 594;

Santa Rosa City R. Co. vs. Central St. Ry. Co., 4 Cal. Unrptd. 950, 38 Pac. 986;

Valley Rys. vs. City of Harrisburg, 280 Pa. 402, 124 Atl., 644, 647;

Chicago, Rock Island and Pacific R. R. Co. vs. City of Joliet, 79 Ill., 25, 39;

The Chicago & Northwestern Ry. Co. vs. People, ex rel., The City of Elgin, 91 Ill., 251, 254;

The foregoing authorities on the basis of the record in this case not only establish an estoppel against the respondent City, but that to the extent any consent or agreement is necessary it will be presumed from the acquiescence and silence of the city. That agreement must require only a reasonable use. It is conceivable that the method of use should be changed from time to time with new developments in city life.

However, no disagreement as to the mode of use having ever been expressed by the city, and no demand having been made by it for a new agreement since 1924, we submit that certainly the city is estopped to deny that it has to this date agreed to the existing mode of use. The statute under which the city was given the right to agree to the mode of use prescribed no definite way in which this was to be done. We therefore submit that the city could not have agreed to the mode of use in any more conclusive fashion than it has done, namely, by acquiescing and failing to make any objection to the mode of use, knowing all the time that the properties in question have been transferred from one company to another and have been maintained under a clear claim of right by the power company and its predecessors. No objection has appeared upon the part of the city except its attempt to oust the power company solely under the claim that the power company is without right in the city streets and public places, which is quite another thing from a failure to agree upon the mode of use.

(d) The Mode of Use Agreement Was Modified by the 1924 Ordinance and Recognized by Both the City and the Company and Has Continued in Effect.

As stated above, on July 1, 1924 the Norwalk City Council passed an ordinance regulating in detail the mode of use of its streets by electric light and power companies.

(Plaintiff's Exhibit 38, R. 438). The record shows that the City called upon the company repeatedly to comply with this ordinance and that the company did comply. (Plaintiff's Exhibits 51-61, 63, 66, R. 457-469; R. 128-130). This ordinance has not been changed and it remains in effect, as admitted in defendant's Answer (R. 48). Hence, there was from 1890 to 1924 an agreement as to mode of use which was express, at least until 1910, and from 1910 on there was at least an implied agreement as to mode of use, with a total absence of any objection by the City, and from 1924 on there were additional provisions as to mode of use which were recognized and agreed to, as demonstrated by the conduct of both the City and the Ohio Electric Power Company thereunder.

The position of the respondent city has been that this ordinance could not be construed to be the consent to use the streets of the city required by the Act of April 1, 1896. Certainly that flat assertion by respondent is not to be accepted in lieu of argument or authority. Contrary to the claim of the respondent City, we respectfully maintain that the effect of this ordinance was three-fold, viz.:

First, it amounted to a request by the city upon the company for a modification of the mode of useagreement which had theretofore been in effect since the passage of the Ordinance of October 7, 1890. The Company's acquiescence in the provisions of the 1924 Ordinance amounted to an acceptance of such modification of the mode of use agreement. The respondent City admits the ordinance still stands unchanged. It therefore stands admitted that there is no existing disagreement as to the mode of use of the streets.

Second, if it were necessary for the operating company, under the provisions of the Act of April 21, 1896, to

obtain the consent of the city to the continued use of the city's streets by the company (which we emphatically deny), this Ordinance of July 1, 1924, and the conduct of the city thereunder above mentioned, clearly would constitute such consent. *Cincinnati v. Diamond Light Co.*, 4 Ohio Appeals 177, relied upon below by the city, is not in point as the Ordinance there in substance provided that it was applicable only in the event municipal grants by other Ordinances should first be made. Nothing of that sort appears in the Norwalk Ordinance of July 1, 1924.

It is pertinent to observe with respect to the effect of the Ordinance of July 1, 1924, that Judge Hahn who heard this case said in the fourth foot note to his Memorandum Opinion "The ordinance is tantamount to a consent to the use of the streets by the City of Norwalk. The record in the case in the Supreme Court of Ohio shows that the ordinance was never called to the attention of that court." (R. 239). Judge Hahn was pointing out in the foot note in which the above quoted statement appears that it was not unlikely that the decision of the Supreme Court of Ohio in the quo warranto suit, 121 O. S. 235, would have been in favor of the utility upon the vitally different record in the case at bar.

Third, the Ordinance of July 1, 1924, and the conduct of the city thereunder constitutes the clearest kind of estoppel against the city and, we submit, forever foreclosed the city from the right to assert that the operating company was not using the city's streets with the consent of, and in the manner approved by, the City of Norwalk. It is, we submit, most unconscionable for the city to pass such an Ordinance, make it applicable to existing lines, serve notice upon the company many times requiring it to conform its lines to the Ordinance, and then claim, after the company has spent very substantial sums of money in so

doing and has loyally lived up to the city's requirements on its part, that the company after all has no rights on the city's streets and can be thrown off at will.

3. The Ordinance of October 7, 1890, and its Acceptance by the Predecessor Corporations Did Not Constitute Either a Waiver or Estoppel and Petitioner is not Precluded From Asserting That Its Mortgagor Has a Perpetual Right to Use the Streets and Public Places of the City of Norwalk.

Respondent asserted below that the acceptance of the ordinance of October 7, 1890, and the admission by petitioner, that whatever rights were conferred by this ordinance were transferred to various predecessors of petitioner's mortgagor, estops petitioner from now asserting that the present company and its predecessors occupied the streets by virtue of any rights acquired direct from the State of Ohio. This argument is, of course, based upon the theory that the ordinance of 1890 in and of itself granted a right to use the streets, a proposition which petitioner does not admit, but which will be assumed for the purpose of arguing this point.

Regarding the matter abstractly, it is difficult to understand why the acceptance of privileges to do a certain thing from separate and concurrent sources of authority should require the grantee of these privileges to rely upon one or the other of the grants, or further, why he should be forced to rely upon the lesser grant. That, in substance, is defendant's claim.

A consideration of the authorities demonstrates that no such rule exists in the law. It is uniformly held that under ordinary circumstances a utility may procure franchises from the municipality as well as the state, without sacrificing its state granted rights. This has been held both where the municipality acted with authority and without.

The ordinance of October 7, 1890, which the respondent City claims was a franchise limited to twenty years binding upon the predecessors of the Ohio Electric Power Company, shows upon its face that its acceptance could not foreclose them from taking a perpetual franchise from the state. We quote from the 1890 ordinance:

"This grant of way is not exclusive * * *" (R. 37).

Even if it be assumed that the city had the power to grant such franchises, that fact would be an immaterial consideration, because the state had the power (on this hypothesis concurrently with the city) under the statutes in effect from 1887 to 1896, and under the authorities the application for, or acceptance of, a municipally granted franchise could not be deemed a negation of the right to take franchises from the state.

In the following cases it is held that the owner of a state granted franchise did not prejudice this right by procuring an additional franchise relating to or embracing the same right from a municipal corporation, although the municipal corporation had authority to grant such a franchise.

The case of *City of Lansing vs. Michigan Power Company*, 183 Michigan, 400, 150 N. W., 250 (except as to the power of the city), was very much like the present situation. In that case the city filed its bill of complaint to compel the defendant to remove from the streets its poles and wires. The city claimed that the respondent's only right to be upon the streets arose out of a franchise granted by the city to respondent's predecessor and assignor, and that the franchise had expired by reason of its terms of limitation. The respondent claimed to be using the streets under a grant of the Legislature contained in Act 264 Public

Acts of 1905. There was no question but what the franchise granted by the city had expired by reason of its terms of limitation, and the city claimed it was not then open to the defendant in the absence of an express negation of use under the city's franchise to make a claim of right under the law of 1905. The opinion of the trial court (approved verbatim by the Michigan Supreme Court) with respect to this contention was as follows:

> "• • • This claim of the city implies that the franchise constituted the sole authority for the use of the streets by defendant, and that, while the franchise was in existence, no other authority could be accepted, though open to all persons and corporations not having a franchise from the city. This position is untenable, for the city had no authority to grant the use of the streets for the setting of poles and the stringing of wires, except as it derived authority by grant of power from the Legislature, and a grant of such authority by the Legislature in no way lessened the sovereign power of the Legislature to also grant the right to individuals and corporations within the city, and to do so regardless of any action by the city.
>
> *"The city of Lansing had authority from the Legislature to grant the franchise in question, but this grant of authority in no way prevented the Legislature from granting the right to all persons, and the franchise did not estop defendant from having the benefit of a general law of the state.*
>
> • • • • • •
>
> "The Act of 1905 granted to defendant, as well as to all others, the right to use the streets for the purposes of promoting and making possible public utility service, and, when defendant made use of such grant, it was not necessary for it to disclaim user under the franchise from the city, for the fran-

chise and the act of 1905 were not at all inconsistent in purpose and scope." (150 N. W. 251) (Italics ours)

The parallel between the Michigan case and our situation upon the point is complete. In that case there was a claim of a city franchise but expressly limited as to time, just as in the Norwalk case the claim was that the city granted a franchise in 1890 expressly limited to twenty years. In the Michigan case the city franchise was followed by the granting of a state franchise just as we contend state franchises were granted to The Incandescent Light & Power Company and the Northern Electric Company, predecessors of the Ohio Electric Power Company, under the Act of 1887, by the granting of their charters in 1891 and 1895, respectively. *It is further pertinent to our case that the Michigan court said that the company in accepting the state franchise was not bound to disclaim user of the rights given by the city.*

The undoubtedly correct holding in the Michigan case above cited demonstrates the position of the defendant city to be untenable. Even if it be conceded that the Ordinance of October 7, 1890, granted to the partnership a twenty year franchise, which was transferred to the predecessors of the Ohio Electric Power Company, it is plain that those predecessors could hold simultaneously such twenty-year franchise and perpetual franchises acquired from the State of Ohio by virtue of their incorporations in 1891 and 1895, respectively. The argument of the respondent city based upon the twenty-year limitation of the 1890 ordinance ignores the obvious fact that any such limitation could not operate adversely upon the perpetual franchises acquired from the State of Ohio. Hence the argument that all franchise rights terminated in 1910 is futile.

To the same effect see:

Town of Golconda vs. Field, 108 Ill., 419.
City of Wichita vs. Old Colony Trust Company, 132 Fed. 641 (C. C. A. 8).
Abott vs. City of Duluth, 104 Fed. 833 (D. C. Minn.) affirmed 117 Fed. 137 (C. C. A. 8).

It is equally true that a state granted franchise is not prejudiced in any way by the acceptance of an unauthorized municipal ordinance, which in term undertakes to grant a franchise. This precise question has been definitely decided against respondent in Ohio by the case of *Farmer vs. Telephone Company*, 72 O. S. 526, supra. The holding was the same in *Macklin vs. Home Telephone Co.*, 1 O. C. C. (N. S.) 373, affirmed 70 O. S. 507, where the ordinance recited that the company was "granted the right to use the streets." The court held the company's state granted rights unaffected.

And see also:

Atlantic & Pacific Railroad Company vs. City of St. Louis, 66 Mo, 228.
Northwestern Telephone Exchange Company vs. Minneapolis, 81 Minn. 140, 86 N. W. 69.
Iowa Telephone Co. vs. Keokuk, 226 Fed. 82.

It is our position that the Ordinance of October 7, 1890, if construed as granting a franchise, was unauthorized by existing law. (See ante pp. 72 to 77). However, this may be, the foregoing cases demonstrate that in any case its acceptance did not constitute a waiver of the state granted franchise.

We are thus brought to a consideration of *Bankers Trust Company vs. Raton*, 258 U. S. 328, chiefly relied upon below by respondent and which, if construed as respondent desires, would stand alone and in direct conflict with the

cases above and many others which might be cited. In view of this, the case must be carefully examined. While that case appears unquestionably to have been properly decided, it has no bearing upon the present situation because of the great distinction in the facts. It appears that that case was concerned with two state acts, one of 1884 and one of 1887, and that the plaintiff was contending that under the Act of 1887 its mortgagor procured the right to use the city streets direct from the state without interference by the City. Upon the other hand, the City contended that the Act of 1887 gave the company the capacity to receive a grant from the City with power of regulation by the City, and that the Act of 1884 giving the right to the City to grant private individuals the power to construct and operate a waterworks system for a term not exceeding twenty-five years, was in harmony with the Act of 1887 and that the water company recognized that fact. The company was incorporated and a contract evidenced by an ordinance was entered into by the City and the company by which the company was to furnish water to the City for twenty-five years, and the City contracted not to operate a competing system for the same period. The twenty-five year period expired in 1916. In 1912 and 1913 the City took steps to build its own system and expended better than $30,000 in so doing.

In the first place, it appears from the opinion that the Supreme Court of New Mexico (22 N. M., 464, 174 Pac. 423), had previously held that the franchise of the water company was derived from the City, which fact obviously formed a large part of the basis for the decision. In fact it appears from the report in 22 N. M. 464 that the Raton Waterworks Co. in its bill of complaint based its claim on a franchise by ordinance of the City of Raton. This, of course, is directly in contrast with the case at bar, in view

of the fact that the Supreme Court of Ohio had repeatedly held prior to 1925 that electric light and power companies, and other corporations in the same category incorporated between 1887 and 1896, took their franchises directly from the state, municipalities not having the power to grant them during that period.

In the second place, in the Raton case the city's franchise was granted directly to the waterworks company and accepted by it. In our case the attempted grant of the Norwalk ordinance was directly to the predecessor partnership. The successor corporations *acquired their franchises from the state* and then succeeded by assignment to such rights as the partnership had without waiving their state granted rights, as we have shown. The city in the case at bar had no power to grant a franchise to the corporations, it made no such attempt and no such grant was accepted by the predecessor corporations, all of which is exactly contrary to the situation in the Raton case.

In the third place, the city of Raton acted seasonably before the expiration of the 25 year franchise to notify the company to get off the streets at the end of that period. The city there went on to expend money upon the assumption that the right of the waterworks company would expire at the end of the period, while the company stood by without making any claim to perpetual rights, thus laying the basis for an equitable estoppel, which is not present in the case at bar, where the city at no time took any action upon the basis that the company's rights expired either in 1910 or 1915. Instead the City of Norwalk waited more than fifteen years after the 1890 ordinance expired and instead of there being an estoppel against this plaintiff, very clearly the city is now estopped to assert any rights under the 1890 ordinance. We think the District Court properly disposed of defendant's contentions based on the Raton

case by pointing out that "none of the 'conventional elements' of equitable estoppel are present here". (R. 233).

Furthermore, the City of Raton did nothing to recognize the rights of the waterworks company, whereas, in our case, the City of Norwalk by its ordinance of 1924 and the application thereof by its officials to the Ohio Electric Power Company, defined a modified mode of use of its streets by that company which has been uniformly observed.

That the mere granting of a non-exclusive franchise does not constitute conduct raising an estoppel in favor of the city see *Macklin v. Home Telephone Co.*, 1 O. C. C. (N. S.) 373, 383. (Affirmed, 70 O. S. 507).

That the Raton case depends upon a true estoppel is illustrated by *Central Power Co. v. Central City*, 282 Fed. 998 (C. C. A. 8), where it was followed and applied. In that case the city had dismantled its plant upon the faith of a contract with the company. Quite properly, the company was held to be estopped from questioning the validity of the contract.

The conduct of the City of Norwalk has been entirely out of accord with the position it now takes. No action whatsoever was taken against the predecessor company in 1910 or 1915. It was neither requested to remove from the city nor to comply with new regulations. After the expiration in the fall of 1915 of the street lighting contract of 1905, current was furnished for street lighting upon the request of the city officials until the municipal plant was put in operation. Even after the construction of the municipal plant the city at no time prior to 1926 questioned the right of the company to use the streets and during all of that period imposed various regulations. Clearly the city never expended any money or took any action upon the assumption that the company's rights expired in 1910 or even in 1915.

And it cannot well be said that the companies did not operate in reliance upon a claim of right to use the streets by virtue of the state franchises. What better claim of right exists than the continuous open user by plaintiff's mortgagor and its predecessors? The conduct of the various companies exhibited an understanding that their rights were not dependent on the Ordinance of 1890. Concrete evidence of this is the letter of Mr. Craig (now one of counsel for the respondent City), written in 1917, but *then* acting as attorney for the then operating company. That letter certainly is not indicative of any surrender of rights by the company. . (Plaintiff's Ex. 77, R. 480).

Nor did the respondent plead any estoppel against the petitioner in this case.

4. The Franchise Rights of Plaintiff's Mortgagor Are Not Impaired or Affected by the Act of April 21, 1896.

Section 3471a, R. S. 1890 was amended by the Act of April 21, 1896 (92 O. L. 204). The original section was preserved, making the provisions of the telegraph section applicable to electric companies, except Sec. 3461, and with the following proviso:

> "* * * Provided, however, that in order to subject the same to municipal control alone no person or company shall place, string, construct, or maintain any line * * * through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality. * * *"

The real question presented is as to the effect of this amendment of 1896 upon the perpetual rights to use the streets conferred directly by the state upon the predecessor companies organized in 1891 and 1895. Were previously granted rights thereby destroyed and subsequent use of the streets made subject to the sole control of the munici-

pality, and, if so, was such legislation by the State of Ohio in harmony with the Federal Constitution?

On this we take the position, first, that the amendment properly construed does not apply so as to authorize or permit any impairment of rights previously granted; second, that if it does, it violates the Federal Constitution.

(a) The Statute Was Prospective in its Operation.

The statute says that no company *shall* construct or maintain a line. This language clearly suggests that only future construction was contemplated, and there is nothing in the statute expressly making it applicable to companies already occupying the streets. It is well settled that statutes are not to be given a restrospective interpretation unless it is absolutely required. *Cameron v. United States*, 231 U. S. 710, 720.

The Act of 1896 has been so construed by the Ohio Supreme Court. *Ohio Public Service Co. vs. State*, Ex *Rel, Fritz*, 113 O. S. 325:

> "The rights acquired by the Orrville Light, Heat, & Power Company from the state in 1893, under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the Village of Orrville, nor by the state of Ohio, after the passage of the amendment of 1896." (p. 337)

To the same effect see: *State vs. Iowa Telephone Co.*, 175 Iowa 607, 154 N. W. 678, and Michigan Telephone Co. vs. Benton Harbor, 121 Mich. 512, 80 N. W. 386.

Respondent sought to avoid this construction below by relying upon the language of Mr. Justice Clarke in *Hardin-Wyandot Lighting Co. vs. Upper Sandusky*, 251 U. S. 173, where, in discussing the Act of 1896, he says that it was,

> "* * * a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the state." (P. 178).

However, Mr. Justice Clarke's remarks must be limited to the subject which he was discussing. He expressly points out that the right of the company to maintain its equipment for commercial purposes was not involved. He made it clear that he considered the statute as relating only to the exercise of police power by the municipality, rather than as conferring the absolute power to grant or withhold the right to use the streets. This is clear from his statement at page 178 of the opinion, that,

> "* * * all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets.
>
> "We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation. Any modification of its rights which the company may suffer from this law passed *in a reasonable exercise of the police power* does not constitute an impairing of the obligation of its contract with the State or village and is not a taking of its property without due process of law within the meaning of the constitutional prohibition. Northern Pacific Ry. Co. v. Puget Sound & Willapa Harbor Ry. Co., 250 U. S. 332, and cases cited." (Italics ours).

Justice Clarke did not say that the statute conferred upon the municipality the right to *deny* the use of the streets to one having a vested right to the use thereof.

Even if the Act of 1896 is meant to apply to companies then operating, we submit it was meant to accomplish nothing more than to confer complete power of regulation upon the municipalities without the interference of the probate court. This is the construction given the statute by Mr. Justice Clarke, as pointed out above and is preferable to any construction making the statute unconstitutional.

This construction finds adequate support from:

Wisconsin Telephone Company vs. Oshkosh, 62 Wis. 32, 21 N. W. 828.

Michigan Telephone Co. vs. Benton Harbor, 121 Mich. 512, 80 N. W., 386.

(b) Construed Otherwise the Statute is Unconstitional.

If neither of the foregoing views as to the construction of this Act is correct, and it does attempt to confer upon the City complete power to terminate and destroy pre-existing rights to use the streets in the City of Norwalk under state granted franchises, we then say that the statute is clearly unconstitutional.

The rights conferred upon The Incandescent Light & Power Company and The Northern Electric Company by their incorporation in 1891 and 1895 were unlimited as to time. Under the settled rule applied by the United States Supreme Court to Ohio franchises coming into existence during this period, perpetual franchises came into being.

Northern Ohio Traction Co. vs. Ohio, 245 U. S. 574.

Ohio Public Service Co.. vs. Ohio, Ex Rel. Fritz, 274 U. S. 12.

We quote the following from the latter case:

"Louisville vs. Cumberland Telephone Co., 224

> U. S. 649, 661, and Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 75, are enough to show that the rights acquired under the ordinance of 1892 were assignable without further consent by the village. *If to enforce the Ohio statute of* 1896 *would destroy this right, it conflicts with the provision of the federal Constitution—No State shall pass any law impairing the obligation of contracts.*" (P. 14) (Italics ours).

A state having granted a perpetual right to use the streets of a municipality cannot by later legislation make this right of use subject to municipal consent. This exact point was decided in the case of *Russell vs. Sebastian,* 233 U. S. 195, where the constitutional provision under which the gas company had acquired a state franchise in the city streets was amended substantially as the Ohio act of 1896 amended that of 1887. The Court not only held that the city could not oust the present system but also that under the original constitutional grant the company was entitled to extend its system.

An interpretation of the Act of 1896, which would permit the city to terminate the franchise rights, cannot be sustained as an exercise of the right to alter or repeal laws relative to the formation of corporations reserved in Ohio Constitution Article XIII, Section 2. The vested right to use the streets is a property right, *Louisville vs. Cumberland Telephone Co.*, 224 U. S. 649, 661, which the legislature cannot destroy under the guise of exercising the right to alter or repeal; *Detroit vs. D. & H. Plank-Road Co.*, 43 Mich. 140, 5 N. W. 275, where it was said:

> "A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation." (5 N. W. 281)

That case was cited and followed by the *Ohio Supreme Court in Ohio vs. Neff*, 52 O. S. 375 and in *Lansing vs. Michigan Power Company*, 183 Mich. 400, 150 N. W. 250.

See also:

Shields v. Ohio, 95 U. S. 324.

Detroit v. Plank-Road Co., 43 Mich. 140.

Orr v. Bracken Co., 81 Ky. Rep. 593.

People v. O'Brien, 111 N. Y. 1, 18 N. E. 692.

Iowa Telephone Co. v. Keokuk, 226 Fed. 82.

Ohio Constitution, Article I, Section 2, prohibits the grant of irrepealable special privileges. A non-exclusive franchise does not come within this section. See *Old Colony Trust Company vs. Omaha*, 230 U. S. 100, which quotes from *Plattsmouth vs. Nebraska Telephone Company*, 80 Neb. 460, 464, 465, 114 N. W. 588 as follows:

> "'* * * A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. * * * Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The contention, therefore, that ordinance No. 91 is void and confers no right upon the defendant cannot be sustained.'" (pp. 464, 465).

Finally as the District Court pointed out (Memorandum Opinion Footnote, R. 231), this record exhibits no attempt by the state of Ohio to exercise the reserve power with reference to the rights of petitioner's mortgagor or its predecessors.

5. The Franchises Acquired by the Predecessors of Plaintiff's Mortgagor Are Assignable.

Respondent claimed below that the franchises herein involved were non-assignable and thus that the franchise rights never passed to petitioner's mortgagor. Any such claim is without merit for at least three reasons:

In the first place, these franchises were and are assignable under the decisions of this court.

Louisville v. Cumberland Tel. Co., 224 U. S. 649, 661.

Owensboro v. Cumberland Tel. Co., 230 U. S. 58, 75.

Ohio Public Service Co. v. Ohio, ex rel., 274 U. S. 12, 14.

It is of no consequence that the rights of the Incandescent Light & Power Company were transferred to individuals for a short period in 1895. This is true because identical rights were secured upon the incorporation of the Northern Electric Company a short time thereafter, and also because of the recognized rule that the transfer of a franchise to an individual who serves merely as a conduit of title does not violate any rule holding that franchises can be exercised only by corporations.

Parker v. Elmyra C. & N. R. Co., 165 N. Y. 274, 59 N. E. 81.

In re *Long Acre Light & Power Co.*, 102 N. Y. S. 242.

It can make no difference that the title was held by Victor Emanuel for a short period of time in 1924. Here again the individual served only as a conduit and transferred the property to his own company, the Ohio Electric Power Company.

Furthermore, the Ohio statutes in effect in 1924 permitted the exercise of public utility franchises by an indi-

vidual as well as a corporation. See Ohio General Code, Sec. 614-2, 614-2a. And in accordance with Section 614-60 the transfer to Mr. Emanuel was approved by the Ohio Public Utilities Commission (Plaintiff's Exhibit 15, R. 333). The State of Ohio having originally granted the franchises and subsequently authorized the transfer to an individual, we fail to see how it can be argued that the transfer was ineffective.

In the second place, state granted franchises are involved. This being true, the respondent certainly has no right to question the validity of the assignment of contract rights, it not having been a party to the contract.

Blair vs. Chicago, 201 U. S. 400, 450.

Minersville vs. Schuylkill Electric Railway Company, 205 Pa. 402, 54 Atl. 1053.

In the third place, respondent is estopped by its conduct from questioning the validity of these assignments. The most recent one was made in 1924 and others were made as early as 1895. Prior to 1926 the City not only stood by, not questioning the validity of these assignments and allowing the various assignees to maintain and improve the system, pay taxes and expend large sums of money, but dealt contractually with various ones of the successive assignees. That these facts constitute an estoppel, see *Louisville vs. Cumberland Telephone Company*, 224 U. S. 649, 662; *People vs. Union Gas Company*, 254 Ill. 395, 98 N. E. 768; *E. Tenn. Telephone Company vs. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564.

6. The Street Lighting Contract of 1905 Did Not Terminate the Rights of the Predecessors of Plaintiff's Mortgagor.

It is one of respondent's claims that the street lighting contract entered into in 1905 between the City and The

Cleveland & Southwestern Traction Company, one of the predecessors of the Ohio Electric Power Company, expressly limited the rights of that company in the streets and public places of Norwalk so as to terminate all its rights on August 31, 1915, and that hence the Ohio Electric Power Company does not have any perpetual franchise rights.

A careful consideration of the terms of the contract in question will demonstrate that it neither operated as a limitation imposed by the City upon the right of the predecessors of the Ohio Electric Power Company to occupy the streets and public places of the City, nor did it operate to divest any perpetual franchise rights theretofore acquired by predecessors of the Ohio Electric Power Company.

The contract of April 13, 1905, between the City of Norwalk and The Cleveland & Southwestern Traction Company is set forth at pages 541-551, of the record.

The contract of 1905 did not purport to deal with the franchise to occupy and use the streets of Norwalk for commercial light and power purposes. The subject and the only subject of the contract of 1905 was street lighting. This is shown upon the face of the contract in Section 1, the pertinent portion of which reads as follows:

> "1. The contractor shall erect and install adequate and necessary generating plant and machinery, overhead distributing system and buildings and shall furnish all labor, materials, apparatus, fuel, renewals, repairs and other things necessary for and incident to the successful supply of street lighting service as herein specified. That said street lighting service shall consist of the maintenance and operation, for the full term of ten years beginning on the first day of September, A. D. 1905, of 100 or more arc lights of the kind and description hereinafter designated * * *". (R. 541)

Section 10 of the contract gave the city the right to use the company's poles for fire alarm and police patrol boxes, etc.

We now come to Section 14 of the contract upon which the contention is based that the contract had the effect of terminating the company's franchise. Section 14 is as follows:

> "14. Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its *said* lamps, wires, poles and apparatus, but in *such* use of *said* streets, alleys and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon *said* use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this contract or prevent said contractor from carrying out the same, and provided further that nothing *herein contained* shall permit said use or occupation of *said* streets, alleys and other public places after the expiration of this contract, to-wit: August 31, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns *hereunder*, or from revoking the grant of *said* rights for non-user or mis-user thereof through failure of said contractor or assigns to furnish such street, commercial and residence lighting to the said city, and the residents and inhabitants thereof, or otherwise.
>
> "The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the

> streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition, as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred." (R. 548) (Italics ours).

Now obviously to us the use in Section 14 of the language "its said lamps, wires, poles and apparatus", "such use of said streets, etc.", "nothing herein contained shall permit said use or occupation of said streets, etc. * * * after the expiration of this contract, to-wit: August 31, 1915", "or shall prevent the said city from revoking said contractor's right to the use of said streets * * *" "or from revoking the grant of said rights for non-user or mis-user", indicates that the reference in each of the quoted phrases was to the use and the right to use the streets by the company for the sole and only purpose of street lighting. True it is that the second paragraph of Section 14 the Company agrees at the expiration of the contract, *upon the request of the City,* to remove all equipment of every kind from the streets, etc., but to construe this agreement as a renunciation of the franchise rights acquired in 1891 and 1895 seems to us to do violence to all principles of contract construction. At no place in the contract is the company's franchise to use the streets for commercial light and power purposes touched upon, and it is inconceivable to us that the contract should be construed as an abandonment by the Company in 1915 of its perpetual franchise rights in the streets without an express stipulation to that effect. (This was Mr. Craig's view in 1917, see his letter. Plaintiff's Exhibit 77, R. 488-9). This conclusion is reinforced by a perusal of the contract, which shows that it was an ordi-

nary straight out and out contract for municipal street lighting, and that it conferred no such special and wonderful benefits upon the Company as to warrant the interpretation that in return therefor the Company was to surrender its perpetual franchise upon the termination of the contract. As a matter of law any such interpretation would render the contract invalid as an illegal attempt by the City to exact compensation for the use of its streets in violation of Section 3461, Rev. Stat. 1890. *Farmer v. Columbiana County Telephone Company*, 72 O. S. 526.

A circumstance which to us has some significance is the fact that in 1905, under the Act of October 22nd, 1902, Sec. 45 Gen. Code of Ohio, Sec. 3809) 96 O. L. 20, then in effect, a city could not enter into a contract for street lighting for a period in excess of ten years.

Certainly the foregoing explains why the contract of 1905 was limited to ten years, and while the fact of this limitation is not at all controlling in interpreting the contract, it does show the reason for the limitation of ten years, and thus operates to deprive of any effect whatever the argument that the limitation was imposed for any other purpose.

That the contract had nothing to do with commercial lighting equipment was recognized by the Supreme Court of Ohio in the quo warranto case, 121 O. S., 235, at page 238 in explicit language.

That court further said with reference to the 1905 contract in the following sentence, which first refers to the so-called municipally granted franchise of 1890:

> "* * * That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof,

> ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed." (p. 240).

By this language, we submit, the Supreme Court of Ohio merely meant that the so-called municipally granted franchise having expired in 1910, the last claim of any of the predecessors of the Ohio Electric Power Company to rightful occupancy of the streets for any purpose (that is under the street lighting contract of 1905) expired in 1915. It did not hold that the state granted franchises being still in force in 1915 were then terminated *by the effect of* the *street lighting contract,* which effect must be given to it if it is to constitute a defense to our claim as to the existence of a perpetual franchise derived from the State of Ohio.

As if the foregoing considerations were not amply sufficient to dispose of the argument based on the 1905 contract, as pointed out by the District Court, (Memorandum opinion R. 235), an even more conclusive reason for holding that the 1905 contract does not affect the rights of the petitioner exists in the language of the contract, Section 14:

> "The said contractor, at the expiration of this contract, shall *upon request of the said city,* remove all poles, etc. * * *" (Italics ours).

This gave to the city an option. The company was not required to remove unless requested to do so. The right of the city was to make definite request "at the expiration of this contract," and when the city did not do so then or

within a reasonable time thereafter, it waived any such right by delaying any request until the passage of the ordinance, of March 23, 1926, even if that ordinance could be considered a request referable to the contract. 13 C. J. 630. Page on Contracts, Vol. 4, p. 3553 and p. 3646. Williston on Contracts, Section 853. This is especially true in view of the passage of the regulatory ordinance by the city in 1924 (Plaintiff's Exhibit 38, R. 438) and the company's compliance with the City's orders issued thereunder. (Plaintiff's Exs. 51-61, 63, R. 457-67; R. 128-130).

Counsel for the respondent below sought to avoid the force of this fatal omission by the city by claiming that the ordinance and resolutions of the City Council (Plaintiff's Exs. 41, 42 and 445, R. 44, 445, 449), and particularly the ordinance of March 23, 1926, had reference to the contract. These ordinances, however, not only came too late, but would not support any such claim if they had been seasonably adopted. As clearly pointed out by Judge Hahn, the gist of the ordinances and of the petition in quo warranto was that the Ohio Electric Power Company was using franchise rights not granted it by lawful authority and without the consent and authority of the state or the City of Norwalk. None of these resolutions having contained any reference to the 1905 contract, and nothing else having been done by the city to satisfy the requirement as to request, it is plain that the city is now estopped from relying upon any provisions in the contract for termination of the franchises under the well-known rule of *Railroad Company vs. McCarthy*, 96 U. S. 258:

> "Where a party gives a reason for his conduct and decision touching anything involved in a con-

troversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (pp. 267, 268).

It was further suggested by respondent that the rule of this case did not apply in view of the exception stated in *Spitzer vs. Board of Trustees*, 267 Fed., 121, 128, because there was no prejudice to the plaintiff. The plain answer to that suggestion is that if the city had taken the position in 1915, or at any time before 1925, that the company then operating the system had no right to be there, because it had contracted to get off the streets, it is evident that neither the Ohio Electric Power Company would have purchased the properties, nor would any of the bondholders represented by plaintiff have purchased the bonds. Further still, if the city in 1924 had undertaken not to regulate the operations of the company, but had passed an ordinance saying the company had no business on the streets because it had contracted to give up its state granted rights to be there, it follows very clearly that nobody would have purchased either the properties or the bonds until that question had been litigated.

Coming to 1926, when the City Council passed the various muster resolutions in the form it did without making any reference to the 1905 contract, it is only reasonable to conclude that there would have been a radical change in the attitude of either the Ohio Electric Power Company or the bondholders, or both. The bondholders and the company were entitled to take the City at its word. That is, they were entitled to come before the trial court

secure in the belief that the City was basing its rights not upon a contract to surrender a state granted franchise, but that there never was, or at least that there was not in 1926 and thereafter, either a state granted, or city granted franchise, as the resolutions stated. Hence, we are confident that the limited rule of the McCarthy case applies, and that the city having stood by watching the properties change hands, the mortgaging thereof, and the sale of bonds, will not be heard to say in a court of equity after the lapse of fifteen years, that it can come forward and cut off the company's rights upon the strength of anything contained in the 1905 lighting contract.

F.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals in holding that the injunction granted by the District Court is within the inhibition of Judicial Code Section 265, misconstrues the order of the District Court and erroneously limits the power and authority of the federal courts to give relief against unconscionable use by the respondent City of the state court quo warranto judgment. The action of the court below in ordering petitioner's bill dismissed without passing upon the questions as to the franchises and petitioner's lien, if permitted to stand, will result in the total destruction of the bondholders' security in Norwalk. As the record shows, there was ample evidence before the District Court of such threatened destruction both by self-help on the part of the city and of an intention to make use of the quo warranto decree. Since the authorities demonstrate that petitioner's mortgagor has

not merely a present continuing right to occupy the streets, alleys and public places of the respondent City with its poles and equipment for the distribution of electricity to private users, but has such right in perpetuity, we submit that the opinion and order of the District Court are indeed conservative. The decree of the Circuit Court of Appeals should be reversed and that of the District Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1933
290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY, OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Respondent.

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A.

INTRODUCTION

While we are reluctant to add another brief to those before the court, we feel obliged to correct certain assertions of fact contained in respondent's brief, and to point out briefly what we deem to be some of the fallacies in respondent's argument.

B.

STATEMENT OF CASE

Respondent claims that the record contains no evidence that the Norwalk City Council was informed of an intention by the Norwalk Incandescent Light Com-

pany, the partnership formed in 1890, to organize a corporation. (Respondent's Brief page 3). This claim is made in spite of the fact that at the time of presentation of the ordinance of October 7, 1890, to the Council, as shown by the record, Mr. Dunmore and Mr. Suhr, two of the partners, frankly told the Council what they proposed to do (R. 61) and prior to the passage of the ordinance the partners had discussions with members of the Council and told them what the partnership plans were (R. 62). Furthermore, when the partnership property was transferred to The Incandescent Light & Power Company, the corporation organized in 1891, the Council confirmed the action of the partners in transferring the partnership property to the corporation (R. 62) and at page 63 of the record is Mr. Suhr's testimony as follows:

> "There is no question but what the Council had been acquainted with the fact that a corporation was being formed."

Respondent at page 7 of its brief says that the only bonds now outstanding are $2,248,500 (the correct figure is $2,600,000, see the record pages 425-430), and that the first of these bonds were issued June 20, 1927, which was after the filing of the quo warranto case in the state court against petitioner's mortgagor. (Respondent's brief p.7).

Respondent in its brief does not base any argument upon this statement, but if the statement is made with some artful design of suggesting to this court that the rights of the bondholders were acquired after the commencement of the quo warranto suit and are therefore not entitled to protection in this suit, it is sufficient to observe that the bonds now outstanding were issued pursuant to the terms of the mortgage and supplemental mortgage

given long before the quo warranto suit was filed (plaintiff's exhibits 28 and 29, R. 379 and 412); and that $1,579,300 thereof were issued for the redemption and in lieu of the same amount of bonds (specifically including those issued upon the basis of the Norwalk property) sold and distributed before the quo warranto proceeding was commenced (R. 184-191; 425-428). There was no payment or discharge of the mortgage and accordingly the present bondholders in equity occupy exactly the same position as the original bondholders, as the District Court held. Memorandum opinion (R. 236) and the following authorities there cited:

3 Thompson on Corporations, 3rd Ed. Sections 2343 and 2403.

Louisville Trust Co. v. Cincinnati, (C. C. A. 6) 76 Fed. 296, 300.

Farmers Loan and Trust Company vs. Meridian Waterworks Company, 139 Fed. 661, 670.

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C.

ARGUMENT

I.

The Injunction Granted by the District Court Does Not Violate Judicial Code Section 265. Petitioner is Entitled to Maintain This Suit On the Showing Made In the District Court.

Respondent makes a plain misstatement at page 12 of its brief in asserting that the District Court injunction

"* * * enjoins the Court of Appeals of Huron County, Ohio, itself, from taking any action whatsoever in the quo warranto case."

Respondent has gone to the length of quoting the injunction in its entirety at pages 8, 9 and 10 of its brief, and the italicized portion on page 9 clearly exhibits respondent's error. The italicized portion shows that not the court itself but that the City and its representatives and others to whom notice of the injunction should come were enjoined

"* * * from applying to any of the courts of the State of Ohio for any writ, process or order * * *."

Obviously the state courts would not make application to themselves for the issuance of a writ or order to enforce the ouster decree, and hence respondent's assertion that the state courts, themselves, are enjoined is a palpable misconstruction.

The respondent in its brief at pages 12, 21, 22, 23 and 24 labors very hard upon the argument that it was not and could not be a party to the quo warranto case; and that it has no standing to seek enforcement of the decree therein, ergo that the injunction granted by the District Court must act upon the Court of Appeals of Huron County, Ohio, otherwise the injunction could have no effect.

It is contended further that the respondent City could not be the real party in interest in the quo warranto suit because quo warranto is the exclusive prerogative of the State of Ohio; that therefore the State of Ohio is the necessary party in this case, and the action should be dismissed as an attempt in effect to sue the state by indirection in violation of the constitutional inhibition against doing so without the state's consent.

The respondent city asserts that the injunction does not fall within the class of cases in which an injunction may be had against enforcement of a judgment by a party to a state court suit, because neither of the parties to this suit were parties to the quo warranto action. Patently quite the reverse must be true taking the case upon the basis of the respondent's own position just paraphrased from its brief (respondent's brief page 12). It is perfectly obvious that the circuit court of appeals treated the respondent city in effect as though the city had been the real plaintiff in the quo warranto suit, otherwise that court would not have held Judicial Code Section 265 applicable at all. Thus respondent in its brief flatly abandons the ground relied upon by the Circuit Court of Appeals in its opinion, and now asks this court to affirm the decision upon a basis diametrically opposed to the opinion of that court. If, as the respondent city says, it was not a party to the quo warranto action and had no standing as a party in the proceedings therein, then it is entirely clear that Section 265 does not bar petitioner from the relief obtained in the District Court for the simple reason that Section 265 is out of the case all together.

However, it does not follow therefrom that the injunction granted by the District Court was a nugatory or vain thing, or that it necessarily constituted a restraint upon the state courts, as the respondent city argues. As the record in this case clearly shows, and as we have pointed out in our main brief, the respondent city instigated, financed and conducted the quo warranto case for its own profit, and not for the benefit of the State of Ohio. It simply caused its attorneys in conjunction with the Prosecuting Attorney of Huron County, Ohio to borrow the name of the State of Ohio to bring a suit to oust the Ohio Electric Power Company without regard for the rights of

this petitioner. Certainly the inevitable inference is that, unless the city is restrained from taking any steps to secure the enforcement of the quo warranto decree, it will seek through its attorneys, or otherwise, to get the state courts to enforce the decree. The city sought and obtained the decree, under the name of the State it is true, and it follows as the day does the night that the city will undertake to secure the enforcement of the decree. Nor does this conclusion have to rest upon inevitable implication or inference, because counsel for the respondent city in their brief at page 28 in discussing the agreement which was made in 1926 between the city solicitor and counsel for petitioner's mortgagor for the maintenance of the status quo during the pendency of the quo warranto litigation:

> "It shows a continuing intention upon the part of the city not to resort to anything other than orderly court action."

And see also respondent's statement to the same effect at page 26 of its brief.

What court action? Obviously it could mean only the insistence of the city upon carrying out the quo warranto suit and securing the enforcement of the decree obtained therein. There has been no other court action by the respondent city, hence we confidently say that the city having been at all times the only motivating force back of the quo warranto suit, the city can and should be enjoined as decreed by the District Court. It is not necessary that the injunction be directed to the state courts either in terms or by any necessary inference of such effect. If this court affirms the action of the District Court, it is inconceivable that the state courts would then in complete disregard of comity act upon their own volition to enforce

the quo warranto decree contrary to the decision of this court, and thereby work a destruction of this petitioner's rights.

Nor will it do for respondent to attempt a distortion of the issues as it does at page 21 of its brief in asserting that petitioner's whole case is based upon the theory that all rights of public utilities in a municipality come from the State of Ohio, which respondent asserts further is inconsistent with our contention that the city was the real party in interest in the quo warranto litigation.

Our claim as stated in our main brief is that petitioner holds a valid lien which attached prior to the quo warranto suit to franchise rights which were derived from the State of Ohio by electric light and power companies (predecessors of petitioner's mortgagor) organized prior to 1896. Nothing in that claim is inconsistent with our further claim that the city is the only impelling force behind the quo warranto suit. Neither does this action constitute any attempt to secure relief against the State of Ohio by indirection. The State of Ohio took no action to oust petitioner's mortgagor from Norwalk; it has not sought to intervene herein and in no manner whatever has the State of Ohio exhibited the slightest interest in this controversy. Nor can the city claim any rights for the State herein. The bugaboo of the State of Ohio as the real party in interest is an attempt by the city to do a "Doctor Jekyll and Mr. Hyde". First the city instigates and conducts a quo warranto suit without making petitioner a party thereto, and having succeeded in getting a decree therein attempts to disclaim all responsibility for the action and says it had nothing to do with it—that it was solely the affair of the State of Ohio. We respectfully submit that the respondent city may not so easily shift its disguise for the purpose of destroying petitioner's rights.

The entire argument of the respondent contains the erroneous suggestion that the present controversy is concerned solely with the quo warranto proceedings, and that this petitioner, although not a party thereto, is bound by what happened therein. This is not true, because as we have shown in our main brief, the bill of complaint and amendments and supplements thereto and the evidence show that petitioner has a complete cause of action against the city based upon the city's unlawful acts and threats wholly apart from the quo warranto proceedings. However, confining ourselves to the narrower question as it relates to the quo warranto decree, we find that counsel for the respondent have set forth and cited authorities in support of the proposition that quo warranto must be brought by the state and that such action is discretionary with the state officials. While the authorities cited in general support this proposition, the entire argument is beside the mark. The real question is not whether or not the city could bring a quo warranto suit in its own name—the real question is whether the case made here is one against the city or the state. Respondent's brief contains no authority in support of its contention that this suit is in reality against the State. Petitioner's pleadings ask no relief against the State and the decree does not attempt to enjoin the State.

Respondent asserts at page 22 of its brief that the Hardin-Wyandot case (93 O. S. 428) held a municipality could not bring an action to secure the removal of an electrical distribution system from its streets, but that the State of Ohio alone could bring such an action. This is an attempt to assimilate the result in that case to respondent's theory rather than to state the actual holdings of the court. The State Supreme Court did not hold that a muni-

cipal corporation could not bring an action to secure the removal of the system, or that it could not be wholly responsible for the bringing of such action in the name of the state.

Directly opposed to respondent's contention is *People, ex rel Fitzhenry v. Union Gas & Electric Company*, 254 Ill. 395, 98 N. E. 768, which was a quo warranto suit to oust the defendant utility company. Defendant claimed that plaintiff was estopped by its conduct from questioning defendant's right to use the streets. In an attempt to avoid the estoppel it was claimed that the action was by the state. Disposing of this claim the court said at page 776 of 98 N. E.

> "Appellee insists that this is a proceeding by the state questioning the right of appellant to exercise a franchise belonging to the state, and therefore the law of estoppel does not apply, (1) because that doctrine cannot be invoked against the state; and (2) the state cannot be estopped by the action or nonaction of the city. *It is true, this suit was begun in the name of the people, but it was brought on the relation of the city attorney of the city of Bloomington, and the affidavit of the relator filed in support of the petition for leave to file the information states that the suit was ordered begun by the city council of the city of Bloomington.* The state granted appellant the authority to exercise its franchise in the city of Bloomington, by and with the consent of the city. The grant from the state was subject to the granting of permission by the municipal authorities. The state, however, was not particularly interested whether the city granted the permission by ordinance, or whether it suffered appellant to exercise the franchise granted it by the state without adopting an ordinance licensing it to do so. *So far as that question is concerned, therefore, the city*

is the real party in interest, and the suit is to be so regarded and treated. People v. Central Union Telephone Co., 232 Ill. 260, 83 N. E. 829; Chicago & Northwestern Railway Co. v, People, 91 Ill. 251." (Italics ours)

Respondent on page 14 of its brief claims a distinction between the right of interference with the enforcement of money judgments and that of interference with the enforcement of a quo warranto decree.

It is not perceived why such a distinction is important or how it can operate against this petitioner. In the one case the plaintiff, holding the money judgment would get out a writ of execution in order to collect, and in the other case the respondent city would apply or have its own paid counsel apply to the court to enforce the ouster. In either case the detriment to the party wronged by the unconscionable enforcement of the judgment would be just as sure and complete. It is no answer to say, as respondent does at page 14 of its brief, that proceedings in quo warranto are still pending within the meaning of Judicial Code Section 265 because the writ of ouster remains unexecuted. The case in that respect stands in no different position from an unexecuted money judgment, and of course respondent's argument carried to the logical conclusion would leave every complainant in suits of this character remediless in the federal courts, for the federal court could not act until the state court judgment had been fully carried out, when necessarily it would be too late to afford complainant any relief. The situation here is precisely the situation which exists when any judgment has been obtained and an attempt is about to be made to make an unconscionable use of that judgment, which is recognized in *Simon v, Southern Railway Co.* 236 U. S. 115 as the

appropriate stage for relief unaffected by the inhibitions of Section 265.

Respondent at page 15 of its brief asserts that in all the cases cited by petitioner herein where a federal court enjoined the prevailing party in the state court from enforcing a judgment secured therein, the judgments were for money only. We have already shown, we think, that any such distinction, if it were true, would be of no importance.

A further inconsistency in respondent's position again appears in that respondent in putting forth this argument considers itself as having been the prevailing party in the quo warranto action, although as observed above, it at the same time vehemently denies that it was a participant in the quo warranto suit. At all events the assertion that there can be relief only against enforcement of a money judgment is untrue. It is necessary only to allude to the decision of this court in the case of *Old Colony Trust Company v. Omaha*, 230 U. S. 100, in which the defendant city was restrained from taking any benefit from a prior decree obtained by it in federal court upholding the validity of a city ordinance. Of course upon the point under discussion it is the character of the prior judgment involved which is in issue, and the fact that the prior suit in the Old Colony case was in the federal court instead of the state court makes no difference.

It is also erroneously stated at page 13 of respondent's brief that in all of the cases cited by petitioner the state court judgment enjoined in the federal court was void or voidable on some well recognized equitable ground, whereas, in the case at bar it can be claimed only by petitioner that it has not been heard upon the merits of its mortgagor's claim of a perpetual franchise in Norwalk.

It is also said that the sole claim of petitioner is that it has presented its claim that the 20-year limitation of the 1890 ordinance was not a binding covenant upon a different theory from the presentation of the same claim by Ohio Electric Power Company in the quo warranto proceedings.

These assertions by respondent at page 13 of its brief constitute a plain distortion of the position taken by this petitioner. Such statements do not take into account that petitioner is asserting the right to protection of a valid lien secured before the quo warranto proceedings upon presently existing franchise rights of petitioner's mortgagor, and such statements are an unwarranted attempt to limit the question involved to the effect solely of a 20-year ordinance, whereas it clearly appears from a reference to the record and to our main brief at page 43 and at pages 68 to 70, both inclusive, that many vital elements are present in this record which make this case widely different from the quo warranto action. The same erroneous conception of the issues herein appears in the first paragraph of respondent's brief on page 20 thereof, where it is stated that in all the cases cited by us for the proposition that the enforcement of a void judgment may be enjoined in a federal court the judgment was either tainted with fraud or obtained under mistake of fact. That statement is inaccurate in any sense for it unquestionably appears from the decisions of this court that the power of federal courts to restrain the enforcement of state court judgments is not confined to those which are void. Nor is it true that in every case cited by us wherein a federal court plaintiff had relief against the enforcement of or from enjoying the benefits of a state court judgment, the state court judgment was tainted with fraud or obtain-

ed under mistake of fact. Cases in which no such thing appeared are:

Old Colony Trust Co. v. Omaha, 230 U. S. 100
Atchison Ry. Co. v. Wells, 265 U. S. 101
Western Union Telegraph Company v. Tompa, (C. C. A. 2 1931) 51 Fed., 2nd Series, 1032.

The true proposition is that petitioner was entitled to maintain this suit unembarrassed by the quo warranto decree on the showing made, that it was not a party to the quo warranto proceedings, that it had a preexisting lien upon the Norwalk properties and franchises of Ohio Electric Power Company, and that the enforcement of the quo warranto decree would irreparably injure its property rights, and that failure on its part to apply for leave to intervene in the state court proceedings by this petitioner, even if it had possessed extra judicial notice thereof, could not constitute negligence barring relief in equity. This is the proposition established by that section of our main brief, pages 29 to 36, both inclusive.

We have informed counsel for the respondent of our intention to rely in argument upon the case of *Old Wayne Life Association v. McDonough*, 204 U. S. 8, which was not cited in our main brief. We desire to add this case to those cited at pages 30 to 36 of our main brief for the reason that the opinion of the majority of the Circuit Court of Appeals in the case at bar contains this statement:

> "The mortgage was given in 1925, and though the appellee" (petitioner here) "was not made a party to the state suit, it is not alleged or claimed that it did not have knowledge of the proceeding or that it could not have intervened there, as mortgagee, and asserted the claims that it now makes as the basis of the relief here sought."

The fact that the record did not contain such evidence seems to have been very influential in leading the majority of the court below to the conclusion that petitioner's bill of complaint should be dismissed.

The *Old Wayne Life Association* case conclusively shows that the court below was in error in attaching any importance to the absence of such evidence. That case was an action in the state courts of Indiana against the Association upon a judgment by default rendered against it in a Pennsylvania court, the only service having been a summons served upon the Insurance Commissioner of Pennsylvania.

In the case to enforce the judgment in the Indiana state courts, the plaintiff from Pennsylvania set up the proceedings in the courts of that state. The Association denied the material facts of the petition and alleged, in the words of the opinion of this court at page 14.

> "* * * that the first notice or knowledge it ever had of the alleged judgment against it was long after the day when it appears to have been rendered."

However, in the words of the opinion at page 19, "*the defendant Association introduced no evidence.*" (Italics ours). The court held that the attempted service of process in Pennsylvania was invalid and, although as we have just shown the Association offered no evidence that it did not have actual knowledge of the pendency of the Pennsylvania case in time to have presented its defense therein, this court reversed the action of the Indiana courts in entering judgment against the Association based on the Pennsylvania judgment. In doing so, this court at page 17 of its opinion quoted from the old case of *Galpin v. Page*, 18 Wall. 350, stating the rule as follows:

> "* * * 'It is a rule as old as the law, and never

more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.' "

We, therefore, submit that the court below erred in holding that this petitioner is not free to maintain this suit without showing affirmatively that it had no knowledge of the quo warranto action until after final judgment therein, or that it could not have appeared therein to assert its rights.

Respondent at page 16 has cited a number of cases for the proposition that the injunction granted by the District Court constitutes a direct interference with the proceedings in the state court.

The case of *Bristow Battery Co v. Board of Commissioners,* 37 Fed. 2nd, 504, is plainly distinguishable from the case at bar.

In the report of the Bristow case there appear the following statements:

1. "Clearly, the contract clause (Article 1, Section 10) is not here involved. No claim is made that the State or City passed a law or enacted an ordinance after these bonds were issued impairing their obligations."

2. "Rogers County" (the federal court plaintiff) "was not a party to either the Eaton case or the Bristow Battery Company case. It is in no manner bound by the judgment in either, and is as free to ask protection of its rights in the courts of the state now, as it was before these cases were decided.

Neither of these judgments has deprived it of its property."

3. "There is no diverse citizenship".

4. "In substance, the bill of complaint asks a federal court to review the rulings of the state supreme court in cases to which complainant was not a party, and to hold that the supreme court was in error. Such a contention does not present a federal question."

From the foregoing it sufficiently appears that the Bristow case is not an authority bearing upon the present case in any way. Here, there is diversity of citizenship; here, the contract clause, Article 1, paragraph 10, is involved, and here, petitioner does not ask the federal court to review the rulings of the state supreme court and to hold that the supreme court was in error. On the contrary, here, the petitioner had a right to choose the federal court as its forum because of diversity of citizenship, and a further right to choose that forum because of the constitutional questions under the contract clause and here petitioner presents the case on facts, varying widely from those in the case decided by the Supreme Court of Ohio.

The case at bar comes within, while the Bristow case falls without, that class of cases in which this court and other federal courts have held that persons situated like the petitioner are entitled to the independent determination of the federal courts upon the questions as to their rights, there being either diversity of citizenship or a constitutional question, or both.

Burgess vs. Seligman, 107 U. S. 20

Kuhn vs. Fairmont Coal Company, 215 U. S. 349.

Moore-Mansfield Construction Co. vs. Electrical Installation Co., 234 U. S. 619

Tidal Oil Co. v. Flanagan, 263 U. S. 444.

Furthermore, while we insist that petitioner under the foregoing authorities would be entitled to a readjudication of the same questions of fact and of law determined in the quo warranto proceedings, this case is not an attempt to review the rulings of the State Supreme Court in the quo warranto case. Hence, it is unlike the *Bristow* case, for it there appeared, as shown by the fourth excerpt from that case quoted above, that it was in substance an undertaking to review the rulings of the Oklahoma Supreme Court. See the fourth foot note to the opinion by Judge Hahn in the District Court:

> "And it is not unlikely that the decision of the Supreme Court of Ohio would have been in favor of the utility upon the vitally different record made in this case. That court's decision to a large extent is based upon the fact that no agreement, other than the Ordinance of 1890 and the street-lighting contracts of 1895 and 1905 were ever entered into with reference to the use and occupancy of the streets.
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> • • •
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> In this case the answer of the defendant admits the enactment of the ordinance of July 1, 1924, (Plaintiff's Exhibit No. 38), which is still in full force and effect. It applies to the Ohio Electric Power Company, and, as already noted, the city demanded and received full compliance with the ordinance on the part of the utility. The ordinance is tantamount to a consent to the use of the streets of the city of Norwalk. The record in the case in the Supreme Court of Ohio shows that the ordinance was never called to the attention of that court." (R. 238, 239)

Russell v. Detrick, 23 Fed. 2nd 175, *Harrison, et al v. Triplex Gold Mines, Ltd., et al*, 33 Fed. 2nd, 667, and

Western Union Telegraph Co. vs. L. & N. Railroad Co., 218 Fed. 628, were all cases in which the plaintiff sought to restrain further proceedings in suits in state courts prior to the securing of judgment in the state courts, and obviously for that reason came within the inhibitions of Judicial Code Section 265. By the same token these cases furnish no support for the proposition that the injunction granted by the District Court was an interference with the quo warranto proceedings in the state courts.

In addition, in the case of *Harrison, et al vs. Triplex Gold Mines, Ltd.*, it clearly appeared that the federal court plaintiffs had been parties to the prior suit, which was in the Canadian courts, and there had enjoyed full opportunity to present their alleged claims that the prior judgment had been obtained by fraud.

In *Evans vs. Gorman*, 115 Fed. 399, it was very evident that the entire estate of the deceased person with which the controversy was concerned had come under the jurisdiction of the state probate court before the federal suit was instituted and relief granted. A demurrer to the bill in the federal court was sustained upon well recognized grounds of comity.

It is very plain that the injunction was denied in *Essanay Film Mfg. Co. vs. Kane*, 258 U. S. 358 because it was an attempt to restrain further prosecution of an action still pending in a state court before judgment. The opinion of this court in this case, as we construe it, distinctly recognizes the right of a federal court plaintiff to enjoin a successful litigant in a prior state court action from making an unconscionable use of a judgment secured in the state court.

> "Besides a challenge of the jurisdiction of the state court for want of due process over defendant *in personam*, to be interposed in that court, and, if

> overruled, followed by invoking the revisory jurisdiction of this court, the final judgment may be questioned collaterally, if in truth there be a want of due process, either defensively, as in Pennoyer v. Neff, 95 U. S. 714, 723-733; see, also, York v. Texas, 137 U. S. 15, 20-21; Western Indemnity Co. v. Rupp, 235 U. S. 261, 273; Baker v. Baker, Eccles & Co., 242 U. S. 394, 401-403; or by adopting the more aggressive method pursued in Simon v. Southern Ry. Co., supra; see, also, Wells-Fargo & Co. v. Taylor, 254 U. S. 175, 183-185. (P. 361-2) ''

Louisville Trust Company v. Cincinnati, (C. C. A. 6) 76 Fed. 296, relied upon by respondent at page 20 of its brief, upon analysis and contrast with the decisions by this court and the decision of that court in *Ballard & Ballard Company v. Munson Steamship Line,* 25 Fed. (2d) 252, does not furnish any support for the proposition that the injunction granted by the District Court violates Judicial Code Section 265.

The sentence from the opinion in the *Louisville Trust* case principally relied upon by respondent is as follows:

> "Neither would it have been proper, under Section 720, Rev. St., to have enjoined the City from applying for any writ which the state court might lawfully issue, or to have prevented, by injunction, the execution of such writ, although its execution might have veen very destructive to the interests of this complainant."

Respondent practically recognizes at page 20 of its brief that this statement constituted dictum because no such injunction was involved in that case, but in any event under the decisions of this court in *Simon v. Southern Railway Co.,* 236 U. S. 115; *Essanay Film Mfg. Co. v. Kane,* 258 U. S. 358, and other cases that statement can-

not be regarded as law. The Louisville case was decided in 1896. The Simon case was decided in 1915. In that case this court first held that after final judgment in the state court there were no "proceedings" pending in the state court to which Section 265 was applicable, and affirmed the judgments of the lower Federal Courts in awarding a perpetual injunction *restraining Simon from enforcing his state court judgment by levy.* Hence, to the extent that any statements contained on page 317 of the opinion in the Louisville case may seem to be a decision in support of respondent's position, such decision must be regarded as having been expressly overruled by this court.

II.

Equitable Relief is Justified Because of Action Taken and Threatened by the Respondent City.

That portion of respondent's brief, pages 24 to 30, inclusive, is devoted to contentions that upon the record there is no showing that petitioner is entitled to the protection by injunction of its rights in the mortgaged franchises and properties of Ohio Electric Power Company in Norwalk. It is first contended that the action of the City Council in passing the resolution of March 23, 1926 and the ordinance of May 18, 1926 (plaintiff's exhibits 42 and 45; R. 445-449) do not constitute laws impairing the obligation of contract, but show only an intention upon the part of the city to follow orderly processes of litigation to determine the rights of petitioner's mortgagor.

This subject is dealt with in our main brief at pages 48 and 49. It is pertinent here to observe that the respondent says, beginning at the foot of its brief, page 27:

> "These resolutions taken as preliminary steps to apply to a court of the country for an adjudication of the rights of the parties are not laws impairing the obligation of a contract."

We ask "The rights of what parties"? The answer is obvious that the only court action which followed the village ordinances in question was the quo warranto suit directed only against Ohio Electric Power Company, in utter disregard of the rights of this petitioner. How can it then be said that the city was following orderly processes of law with respect to the determination of any rights of this petitioner? And we point out again that the quoted sentence from respondent's brief is a further showing, if any be necessary, in the very words of respondent itself, that the respondent was the motivating force behind the quo warranto suit, and that it is therefore necessary that the city be enjoined, if petitioner's rights are not to be destroyed.

In the next place, page 29 of respondent's brief exhibits an inconsistency in its claims with respect to violent destruction of the Norwalk properties, which is nothing less than absurd. On this one page of the brief respondent succeeds in taking exactly opposite positions upon the point. First, the respondent says that the poles and property used by Ohio Electric Power Company which were forcibly removed in 1927, (in violation of the agreement then existing between the city and Ohio Electric Power Company for the preservation of the status quo) were removed under authority of the ordinance of July 1, 1924. In the very next paragraph respondent says as soon as city officials learned of the removal the employees carrying on the work were ordered to desist, and in the next paragraph respondent characterizes the removal of the poles as being "unauthorized action of employees of the department of light and water." *So, in the words of the respondent, first the removal and destruction of this property is authorized, and in the next breath it is unauthorized.*

The fact of the matter as to the intention of the respondent city appears from the finding of the District Court to the effect that it was a case of "proceeding surreptitiously and practically in the night time in removing nine or ten poles on the early morning of October 26, 1927", (R. 237) and that petitioner was entitled to an injunction which would prevent a repetition of like conduct on the part of the city, which the trial court was convinced would follow unless an injunction issued.

We allude briefly also to respondent's claim that any statements attributed to Mr. Craig at the time the bill of complaint herein was filed with respect to the intention of the city, cannot be regarded as proof of any intention upon the part of the respondent to use force or unlawful means to oust petitioner's mortgagor, because at the time Mr. Craig had not been employed to represent respondent in *this litigation*. The answer to this is that it makes no difference that he had not then been employed in *this case*. He was at the time in the employ of the city for the purpose of conducting the quo warranto suit, which had for its object the ouster of petitioner's mortgagor (plaintiff's exhibit 45; R. 449), and undertook to speak for the city which has never attempted to repudiate his statement of the city's intentions.

III.

Petitioner Has a Valid Lien Upon Existing State Granted Franchises of its Mortgagor in the Streets of Respondent.

1. The Ordinance of October 7, 1890, Was Ineffective as a Franchise Grant, But Became Effective as a Mode of Use Agreement.

Pages 32 to 36 of respondent's brief are devoted to the argument that the Act of January 26, 1887 did not repeal the Act of May 12, 1886, so that it is claimed the council of

the respondent city had full authority to pass the ordinance of October 7, 1890 under the former act. This is a step in respondent's argument that the ordinance constituted a contract binding upon petitioner's mortgagor as the ultimate successor to The Norwalk Incandescent Light Company, the partnership organized in 1890, to which the ordinance was directed.

We think it is conclusively demonstrated by the case of *Hardin-Wyandot Lighting Company v. Upper Sandusky,* 93 O. S. 428 that the 1887 Act did repeal that of 1886 and shall not repeat at this point the argument contained in our main brief (pp. 63, 64 thereof).

In any event, petitioner is not forced to rest its case upon the repeal of the 1886 Act by that of 1887. As shown in our main brief (pp. 92 to 95 thereof and authorities there cited) the predecessor companies of petitioner's mortgagor, when they were incorporated in 1891 and 1895, could and did derive perpetual franchises direct from the state, and even if the ordinance of 1890 be construed as a franchise, its acceptance could not prejudice or limit the term of the state granted rights.

Respondent, as anticipated, contends that in the absence of any state statute specifically authorizing the city to grant a franchise, the city nevertheless had such power by reason of its inherent general power to regulate and control its streets. This proposition of the respondent is not supported by a single one of the cases cited therefor at pages 37 and 38 of its brief. In every one of these cases it is apparent that the city acted not under a general power, but did so pursuant to a specific statute. *Kinsman Street Railroad Co. v. Broadway R. R. Co.* 36 U. S. 239, is disposed of on that basis in our main brief at page 75 thereof.

Hattersly v. Waterville, 16 O. C. C. 226, decided in

1904 and having no relation to the conditions prevailing with respect to electric light companies from 1887 to 1896, was a case where there were specific statutes regulating the construction of street railroads in municipalities, and while there is language in that case indicating the court's view that a municipality had general powers to permit the operation of street railroads through its streets, the reasoning proceeds expressly upon the basis that the streets are primarily for a means of transportation and conveyance.

Columbus Citizens Telephone Co. v. Columbus (1913) 88 O. S. 466, involved the right to place telephone wires in conduits under the street, as to which it has been uniformly held that the consent of the city must be obtained.

Columbus v. Public Utilities Commission (1921) 103 O. S. 79, for the same reason is equally inapplicable. It clearly appears that the statutes there in effect required the consent of the city as a condition precedent, and that the city was acting not under a general power to control streets, but under the authority of state statutes (pages 89 to 92 of that opinion). Anything said by Judge Wanamaker in his concurring opinion cannot be regarded either as the law of that case or as the law of Ohio.

Pike's Peak Power Company v. Colorado Springs (C. C. A. 8, 1900) 105 Fed. 1, involved an entirely different question, and it appears in the opinion in that case at page 10 that the city acted under the express authority of state statutes.

Thus the cases relied upon by respondent do not support its contentions.

Respondent at pages 39 to 44 inclusive of its brief claims that this court and the courts of Ohio have uniformly held franchise ordinances such as the ordinance of October 7, 1890 to be valid contracts binding upon the util-

ity and its transferees. Any such conclusion could be reached only upon the most superficial examination of the cases in question, as we shall show. Authorities not dealing with the particular state of the Ohio law as it existed between 1887 and 1896 with reference to franchise rights of telegraph, telephone and electric light companies in municipalities do not apply. Such franchises during that period were derived only from the state; municipalities could not grant this type of franchise. Their only function was to agree upon the "mode of use". *Zanesville v. Zanesville Telegraph & Telephone Company,* 64 O. S. 67; *Farmer v. Columbiana Telephone Co.,* 72 O. S. 526; *Queen City Telephone Co. v. Cincinnati,* 73 O. S. 64; *Hardin-Wyandot Lighting Company v. Upper Sandusky,* 93 O. S. 428, 251 U. S. 173.

Northern Ohio Traction Company v. Ohio (1918) 245 U. S., 574 was a case where a street railway franchise was granted by county commissioners, but the commissioners had the express power to make the grant under a specific statute not under consideration here. Obviously there is nothing in that case in derogation of the proposition that the corporations organized in 1891 and 1895 acquired their franchise rights directly from the State of Ohio, unaffected by any time limitation contained in the 1890 ordinance.

In neither of the other two cases, *Hardin-Wyandot Lighting Company v. Upper Sandusky,* (1919) 251 U. S. 173, and *Ohio Public Service Company vs. State,* 274 U. S. 12, did this court consider the general power of a municipality apart from statutory authority.

An analysis of the Ohio Public Service case shows that it does not support the proposition urged for it by respondent. Contrary to what respondent claims, the opinion by Judge Allen in that case in 113 O. S. 325 shows that the nature of the grant secured by the company from

the state was practically not discussed in argument. (Pages 330, 331 of that opinion).

It is further evident that although the opinion contained considerable discussion as to the nature of such rights, the decision turned simply upon the question as to whether those rights, whatever they were, were assignable in 1907 in view of the provisions of the Act of 1896. At page 333 the court said:

> "It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable."

The court did, however, practically recognize that state granted rights were involved at page 337:

> "* * * *The rights acquired* by the Orrville Light, Heat & Power Company *from the state in 1893,* under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the village of Orrville, nor by the State of Ohio, after the passage of the amendment of 1896." (Italics ours)

When this court came to review the Ohio Public Service case (274 U. S. 12) as we construe the issues and the decision, this court was concerned solely with the question of revocability of the franchise rights as determined adversely to the company in 113 O. S. 325. It is not evident from the opinion of this court that its decision turned upon the question as to whether or not there was a state or municipally granted franchise as respondent claims, but that this court simply held consistently with *Northern Ohio Traction Company v. Ohio, supra,* that the franchise rights

which the State Supreme Court had found to exist were not subject to termination at the mere will of the city, and that if the statute of 1896 were construed to sustain such a right to terminate the franchise, it was in conflict with the contract impairment clause of the federal constitution. We submit that the decision in the case would have been the same whether or not the franchise was from the state or the municipality, so that it was wholly unnecessary for this court to go into the question as to the source of the franchise. And we submit that in *Hardin-Wyandot Lighting Company v. Upper Sandusky,* 93 O. S. 428, 251 U. S. 173, neither the court nor the Ohio Supreme Court gave effect to the ordinance there involved as a contract. The decision in each court went upon the ground that the Act of 1896 prevented the utility from resuming its street lighting business without the consent of the Village *after having abandoned such rights.* See our main brief pp. 64-66. The result may be tested in another way. If, as respondent says, the ordinance in that case had been regarded as a contract, obviously the abandonment by the Company of the street lighting obligations would have been such a breach thereof that the courts would have held that the company was not entitled to continue operation of its commercial lighting system, the right to continue which both courts were careful to recognize.

The cases of *Cleveland v. Cleveland City Railway Company,* 194 U. S. 517, and *Columbus Ry. Light and Power Company v. Columbus,* 249 U. S. 399, can afford no comfort to respondent, because they were both street railway cases and under the statutes involved therein the municipality had express statutory authorization to fix the terms and conditions upon which the railway company might use the streets, as distinguished from the statutes involved in the case at bar, where the city had no such authority.

Admittedly, respondent does not claim that its council had authority to pass the ordinance of October 7, 1890, under the Act of 1887, which we contend repealed that of 1886. See p. 41 of respondent's brief. The respondent also says that it had inherent power to make the grant without respect to the Act of 1886 (p. 36 of respondent's brief). The lack of reason in respondent's claim thus more fully appears, for if there was full power in the City to make such a grant, which upon acceptance would become a binding contract, then there was no reason why either the Act of 1886 or that of 1896 should have been passed by the State Legislature.

Respondent at page 44 of its brief quotes from the separate concurring opinion of Marshall, C. J. in *Columbus v. Public Utilities Commission*, 103 O. S. 79, to the effect that the "principle of entirety of contract must apply" to that case, and on this basis the claim that petitioner cannot have the benefit of the 1890 ordinance as a mode of use agreement and at the same time invoke the aid of the court of equity for relief from its time limitations, upon the principle that entirety of contract applies. In that case no four of the judges could agree why the case should be decided as they decided it (103 O. S. 79) and what Marshall, C. J. said has no application here. The authority cited and the quotation therefrom is utterly inapplicable because the respondent assumes at least three things which are not true; first, that the ordinance constituted a contract; second, that the petitioner herein is asking relief from any of its conditions, and third, that petitioner is relying upon it as the mode of use agreement now in effect.

It is asserted by respondent at page 45 of its brief that petitioner in claiming the benefit of the 1890 Ordinance as a mode of use agreement becomes bound by the

20 year limitation of term contained therein as a limitation upon the franchise rights themselves. This contention ignores the decisions in *Farmer v. Telephone Company*, 72 O. S. 526, *State, ex rel Matthews, v. Central Union Telephone Company*, 14 O. C. C. 273, and *Macklin v. Home Telephone Company*, 1 O. C. C. (N. S.) 373, affirmed 70 O. S. 507.

In all these cases ordinances purporting by their language to grant franchise rights were treated only as mode of use agreements, and restrictions, terms or conditions sought to be imposed by such ordinances were held to be beyond the powers of the municipalities.

In *Farmer v. Telephone Company* the ordinance, which was in the form of a franchise, undertook in terms to impose certain conditions as to rates and free service upon the utility, ran to an individual and his assigns and it was assigned to a corporation. That is the precise situation in the case at bar, the only difference being that here the city claims the right to make effective a limitation as to the term of the rights instead of an exaction as to rates and free service as in the Farmer case. The utility having been held in the Farmer case to be entitled to stand upon the state granted franchises unaffected by the attempted exactions as to rates and service, it follows that petitioner may stand upon the state granted franchises of the corporations organized in 1891 and 1895 respectively unaffected by the attempted 20-year term limitation of the Norwalk city ordinance.

Respondent also relies heavily upon the opinions of the State courts in the quo warranto case. We have pointed out in our main brief (pp. 42, 43, 68-70) why those decisions are not controlling, and shall therefore not repeat that exposition here.

2. The Franchise Rights of Petitioner's Mortgagor in Norwalk Are Incontestible.

Respondent at page 54 of its brief launches into the argument that the predecessor corporations of petitioner's mortgagor which were organized in 1891 and 1895 respectively secured thereby nothing more than the capacity to acquire an easement in the streets and public places of Norwalk. In other words, the claim is that incorporation conferred upon those companies an inchoate right of eminent domain, which respondent claims further was never exercised by agreement with the City or by proceedings in the Probate Court, hence that the right never reached any fruition or became vested, and being inchoate was incapable of assignment.

We feel obliged to point out that counsel for the respondent at page 88 of their brief misstate our position by claiming that we contend the predecessor corporations by incorporation alone secured a complete and vested right to use the streets and public places of Norwalk.

Respondent would have this court believe that the sole inquiry is what franchises did The Incandescent Light & Power Company and the Northern Electric Company secure by incorporation. This is to state but half of the question. We do not contend, as respondent would have this court suppose, that an electric light company could incorporate in 1891, thereafter do absolutely nothing, and now enforce a state granted right to go upon the streets of Norwalk with its poles and lines. Respondent has merely erected and demolished a straw man. Obviously such an incorporation followed by nonuser of the right would constitute a waiver and abandonment thereof. *Hardin-Wyandot Lighting Company v. Upper Sandusky*, 93 O. S. 428. However, such rights could not be defeated or limited by the respondent city so long as the companies

formed in 1891 and 1895 seasonably undertook to exercise them. In other words, reaffirming the position stated by us in our main brief at pages 50 and 51, the companies organized in 1891 and 1895 derived thereby from the State of Ohio perpetual franchises in Norwalk subject only as a condition subsequent to the making of an agreement with the city as to the mode of use of the streets and public places, or in the event of any disagreement or failure to agree, to direction by the Probate Court as to the mode of use. That this condition subsequent has been satisfied because the predecessor companies organized in 1891 and 1895 and all their successors have always exercised their state granted rights under an agreement with the city as to mode of use, we have demonstrated in our main brief, pages 71 to 92, inclusive, and we shall not repeat that argument here.

But it is said by respondent that the question is one of statutory interpretation as to which it cannot clearly be said that the predecessor companies acquired anything more than the capacity to secure an easement, with cases cited at page 55 of respondent's brief. Of those cases *Blair v. Chicago,* 201 U. S. 400, *Cleveland Electric Ry. Co. v. Cleveland,* 204 U. S. 116 and *Wabash R. R. Co. v. Defiance,* 167 U. S. 88 state a general rule under greatly different circumstances, which is undoubtedly correct. Those cases involved such matters as street railway franchises under statutes making the consent of the municipality an express requirement, and the powers of cities to make changes in the grants of streets. Here under the statutes in force from 1887 to 1896 and the unwavering line of decisions construing them, one thing is clear, namely, that the *consent* of the city to the exercise of franchise rights by telegraph, telephone and electric light companies *was not required.*

Approaching the question from another angle, respondent in furtherance of its eminent domain theory, asserts that the statutory privilege of the municipality to agree upon mode of use did not relate to or mean the exercise of the police power. That contention cannot be sustained. In *Macklin v. Home Telephone Company*, 1 O. C. C. (N. S.) 373, affirmed 70 O. S. 507, the court said:

> "* * * The right of use of the streets and public ways by the telephone company is wholly beside and independent of the municipality, and, of course, is to be enjoyed like any other right, without let or hindrance from the municipality, except in the proper exercise of its police power and the efficient discharge of the duty imposed upon it by the provisions of Section 2640, Rev. Stat. to 'keep the streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation open and in repair, and free from nuisance.' Power to discharge the duty imposed by Section 2640, Rev. Stat., in connection with the construction of a telegraph or telephone plant is given by Section 3461, Rev. Stat., and is expressly limited to an agreement fixing the mode of use of the streets and public ways; * * * " (P. 378).

Queen City Telephone Company v. City of Cincinnati, 73 O. S. 64.

Respondent, in its brief p. 67, claims that the immediately foregoing case supports its argument that the predecessor companies secured only an inchoate right of eminent domain and quotes copiously from the opinion. In fact, respondent assumes and claims that the following quotation, taken from page 81 of the opinion, refers to the right of eminent domain discussed on page 77 of the opinion. The quotation is:

> "* * * But, taking the sections of the statute as a

> whole and considering the conditions imposed on the exercise of such right, it is not to be inferred that the municipal authorities are stripped of all power to finally determine any matter relating to the general subject." (P. 81)

Respondent neglects to cite to this court the two sentences immediately following, on page 81 of the opinion, which are as follows:

> "* * * It will be remembered that by section 2640 those authorities are given the control of the streets and are required to keep them open, in repair, and free from nuisance. It is to be noted, also, that by no statute is power given any tribunal to authorize permanent structures upon or in, or the use of any street, which will incommode the public, the dominant purpose being to facilitate public travel and transportation." (P. 81)

We respectfully submit that respondent's assumption has no basis except a wish. We submit it is clear that the sentence relied upon by respondent quite naturally refers to the immediately following sentences, which we have just quoted and which clearly exhibit the opinion of the Ohio Supreme Court that it was the police power which was involved.

And we further submit that it is demonstrated beyond any further question that the words of the statutes giving the city the right to agree upon a mode of use constitute a recognition of the city's right to a reasonable exercise of the police power by *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 251 U. S. 173 at page 178.

It is not necessary, as respondent suggests, for us to maintain the proposition that the city could barter away its police power. Nothing in the statute with relation to mode of use indicates that the mode of use must be fixed

for any certain length of time. An agreement under the statute by the city and the utility with respect to mode of use for the duration of one hour accompanied by the exercise by the utility of its rights in the streets under the statute would have been a sufficient performance of the condition subsequent as to a mode of use agreement. We direct the court's attention to the fact that from 1890 to July, 1924 the predecessors of petitioner's mortgagor occupied the streets without a suggestion from the respondent city that there should be any change in the mode of use. On July 1, 1924 the city's council enacted a new ordinance regulating the construction and maintenance of electric light and power wires and petitioner's mortgagor and its predecessors complied therewith. How can it then be said that there has ever been a failure to satisfy the requirements of the 1887 statute which provided that the city and the company might agree upon the mode of use? How can it be said under such facts that any of the predecessor companies were ever obliged to exercise an inchoate right of eminent domain in order to secure a vested easement as the city argues?

We direct attention, briefly, to some of the authorities relied upon by the city for the proposition that it could impose a limitation of term which would be binding upon petitioner's mortgagors and its predecessors. *State Ex Rel v. Central Union Telephone Co.*, 11 O. C. C. 55 (respondent's brief page 70) was decided six years before *Zanesville v. Zanesville Telegraph and Telephone Co.*, 64 O. S. 67, and to the extent the statements contained therein are in conflict with the *Zanesville case* and the line of cases following it, they can not be regarded as law. Furthermore *State Ex Rel v. Central Union Telephone Co.* was again before the Circuit Court in 14 O. C. C. 273 upon the merits and it was then held that the city was in no position

to oust the company until it was made to appear that no agreement as to mode of use could be made and that the company, after such failure, delayed unreasonably in applying to the Probate Court to fix a mode of use. The decision went upon the ground that the words in the proposed ordinance as to rentals was an attempt by the municipality to secure an illegal exaction in violation of *Section 3461, Revised Statutes. This holding was necessarily inconsistent with the first ruling.*

The broad contention of the respondent city that it could actually place a limitation in time upon the state granted rights is also based upon another line of cases construing statutes patently dissimilar from the statutes here considered.

Louisville Trust Company v. City of Cincinnati, (C. C. A. 6) 76 Fed., 296 involved the street railway statute of 1852 which empowered municipalities "to agree upon the *manner* and upon the *terms and conditions*" (italics ours) upon which their streets might be used. It will be seen at once that the word "manner" in that statute is equivalent to the term "mode of use" in the statute here under consideration, and that the broader phrase "terms and conditions" in the street railway statute therefore cannot possibly be synonomous with "mode of use" as respondent so pontifically asserts at page 79 of its brief.

Furthermore, in the very quotation from the Louisville Trust Case given in respondent's brief at page 76, the court points out the distinction between franchises conferred by the state by organization under the state law, and franchises such as those arising under the street railway act which come from the municipality.

Pomona v. Sunset Telephone Company, 224 U. S. 330 involved a constitutional amendment making the right of utilities dependent upon such conditions as the municipal-

ity might prescribe. *Southern Bell Telephone & Telegraph Co. v. Richmond*, 103 Fed. 31 involved a statute giving use of streets with "consent" of the city. *Indianapolis v. Consumers Gas Trust Company*, 144 Fed. 640 involved an Indiana statute expressly conferring upon the city the right to grant or refuse a license. *In Re Rochester Electric Railway Company*, 123 N. Y. 351, involved a statute requiring municipal consent. *The State, Ex Rel. Martin v. The Ohio Electric Power Company*, 35 O. A. R. 481, affirmed 121 O. S. 235 has been dealt with in our main brief at pages 68-70. *Pawhuska v. Pawhuska Oil and Gas Company*, 28 Okla. 563 was concerned with a statute containing the words "subject to the control of the local municipalities." *Toronto Electric Light Company v. Toronto*, 1917 A. C. 84, 33 Ont. L. Rep. 267 is likewise beside the point because, under the statutes there involved, no right could exist or continue without the consent of the city.

The cases relied upon by respondent can not be regarded as applicable upon the ground that the right to fix "terms and conditions" or to require the "consent" of the municipality is the same as the right to agree on mode of use. Any such contention ignores the fact that the statute conferred no absolute powers upon municipalities, but that in the event of failure to agree, provision was made for resort to the Probate Court to direct the mode of use. Whatever might have been the interpretation relative to the occupation of streets by railroads, the Ohio Supreme Court has held time and again that the privilege of agreeing as to mode of use does not amount to the right to impose "terms and conditions." *Zanesville v. Zanesville Telegraph and Telephone Company*, 64 O. S. 67; *Farmer v. Columbiana County Telephone Co.* 72 O. S. 526; *Queen City Telephone Company v. Cincinnati*, 73 O. S. 64.

The franchises are in perpetuity.

Northern Ohio Traction Co. v. Ohio, 245 U. S. 574; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 112-117.

Respondent's whole argument, that the predecessor companies secured only an inchoate right of eminent domain, which was not assignable, and which was swept away by the Act of 1896, is permeated by the fallacious assumption that there was never any agreement as to mode of use. An agreement as to mode of use for any length of time prior to the Act of 1896 was sufficient to make the franchise rights indefeasible so far as the city is concerned.

There has always been agreement as to mode of use. The city by the ordinance of 1890, which in terms dealt with mode of use, tendered an agreement which ran to a named partnership, its successors and assigns for a period of twenty years. The city knew at the time that the intention of the partners was to form a corporation (see supra, page 2 and record pages 61, 62 and 63). The city knew of the transfer of all the partners' property, including any rights in the 1890 ordinance to the corporation formed in 1891. Thereafter all of the successors in title used the streets of the city with the city's full knowledge in accordance with the terms of the ordinance of 1890. The city dealt contractually with regard to street lighting with some of the companies by contracts made in 1895 and 1905. At the conclusion of the twenty-year period in 1910, and thereafter, the various companies continued the same mode of use. The various companies and the city have for years made joint use of each other's poles, pursuant to ordinance passed in 1916 (plaintiff's exhibit 37, R. 436) after the time when the city claims all rights were gone. When the various companies made any changes in the system the approval of the city authorities was obtained. The city has never to the present time demanded

any new agreement of any kind, with the exception of the ordinance of 1924. The companies have complied with the ordinance of 1924, and without repeating the facts as set forth in our main brief at pages 83 to 89, the city is now estopped to say that there was never any agreement as to mode of use.

Upon these facts it is ridiculous to talk about an inchoate right of eminent domain.

It is asserted by respondent that an agreement as to mode of use under the Act of 1887 could be made only by the method prescribed under Revised Statutes of Ohio Section 1693, respondent's brief page 95. A glance at that statute shows that it was referable only to contracts by a municipality, that is, obligations by which the municipality would become bound for the payment of money or some other valuable consideration. Cities between 1887 and 1896 having had no rights to exact compensation, impose terms or otherwise contract with electric light companies as to the right to use the streets, respondent's argument based upon this statute must fall, because it is based upon the false premise that municipalities could contract with regard to the occupation of their streets by such companies

The case of *Sears, Trustee, v. City of Akron*, 24 U. S. 242, respondent's brief page 105, was concerned solely with the effect of legislation upon inchoate rights. The same observation applies to the cases cited at page 108 of respondent's brief. As pointed out in our main brief and by the District Court, the record shows no attempt by the state to exercise the reserve power with reference to the rights of petitioner's mortgagor or its predecessors.

The case of *Ohio Public Service Company v. Ohio, ex rel Fritz*, 274 U. S. 12, effectively disposes of the argu-

ment, that the franchise rights could be cut off on the strength of the Act of 1896.

Respondent's argument to the effect that the Ordinance of July 1, 1924 does not have any bearing upon this case consists of the assertion, without any authority therefor, that the ordinance could not be a consent to the use of the streets under the Act of 1896 and could not be an agreement as to mode of use under the Act of 1887. It is said to be solely a unilateral act by the city in the exercise of the police power. While we most emphatically deny that it was necessary for the predecessor company operating in Norwalk at the time this ordinance was passed to secure a consent under the Act of 1896, if this court should be of the opinion that such a consent was requisite, no reason whatever is given nor authority cited as to why the ordinance could not constitute such consent.

Certainly the company accepted the provisions of the ordinance by complying therewith. If, as we maintain, the ordinance upon compliance therewith by the company amounted to a modification of the old agreement or a new agreement as to mode of use, the contention that the ordinance was a police measure is perfectly consistent with the position that we have taken, that the provision for agreement as to mode of use in the 1887 Act was for the sole purpose of recognizing the police power of municipalities.

Cincinnati v. Diamond Light Co., 4 Ohio App .177, cited at page 116 of respondent's brief has no bearing here. Respondent says in that case the court denied a claim that an ordinance similar to that of July 1, 1924 constituted a grant of right to lay conduits in the streets. That the ordinances are not similar is shown by the quotation from the Cincinnati ordinance, page 117, respondent's brief, from which it appears that it was applicable only in the

event that municipal grants by *other* ordinances should first be made. The court's decision there was based on a provision which was omitted from the Norwalk ordinance of 1924. The case therefore inferentially supports *our* position.

IV.

The Question As To The Existence Of The Franchise Rights And Petitioner's Interest Therein Should Be Determined According To The Law Of Ohio As Established At The Time The Mortgage Was Given And The Bonds Issued.

We have been informed by counsel for the respondent City that they will rely in argument upon the case of *Hawks v. Hamill*, 288 U. S. 52. Apparently their claim will be that that decision by this court supports their contention that this court should follow the decision in the quo warranto case (*State ex rel Martin v. Ohio Electric Power Co.*, 121 O. S. 235) decided after the acquisition of petitioner's rights involved herein.

Hawks v. Hamill having been decided January 9, 1933, the facts of that case are undoubtedly fresh in the minds of the members of this court and we shall not repeat them. As we construe the language of this court in that case, it does not enunciate the standards of independent judgment which this court would deem appropriate under the far different conditions of the case at bar. There the jurisdiction of the Federal Courts was invoked solely upon the ground of diversity of citizenship. Here the jurisdiction of the Federal Courts is invoked by petitioner not only upon the ground of diversity of citizenship, but also upon the claims of contract impairment and lack of due process of law. This court in the Hawks case specifically recognized that different standards of independent judgment would be appropriate under the conditions here present.

"* * * No controversy is here as to the impairment of the obligation of a contract in violation of the restraints of the federal constitution. *We are not to confuse the standards of independent judgment appropriate in such conditions* * * *.*" (Italics ours)

Page 59 of that opinion.

Coombes v. Getz, 285 U. S. 434, 441;
Schriver v. Woodbine Bank, 285 U. S. 467, 475.

There the perpetual franchise to construct and operate a toll bridge was invalid under the single state court decision rendered *after* the acquisition of the franchise because it violated a provision of the State Constitution prohibiting perpetuities, which provision was in existence at the time of the grant. Here, according to the law of Ohio existing at the time of the franchise grants, as interpreted by an unbroken line of decisions by the Supreme Court of Ohio and by this court in cases from Ohio, rendered prior to the acquisition of petitioner's rights, the franchises were valid grants in perpetuity.

There, although the decision of the Oklahoma Supreme Court interpreting the term "perpetuities" as used in the State Constitution came after the franchise grant, there had not been prior to the grant any decision by the state courts passing upon the validity of such a perpetual grant as that relied upon. Here, prior to the acquisition of petitioner's rights, there had been, as stated above, an unwavering line of decisions, in reliance upon which the rights of the bond-holders were acquired prior to the institution of the quo warranto suit.

There the case did not call for a decision as to the ownership of the bridge or the right of complainants to tear it down thereafter, but related to the privilege of

complainants in exacting payments from the public for its use while maintaing an obstruction of navigable waters. Here the case involves the very essence of the bondholders' security and does not involve any public interest such as that in the Hawks case. Here the respondent city is interested in ousting petitioner's mortgagor which will result in destroying the mortgaged property only in the proprietary capacity of the City for its profit, because the City in 1915 erected and put into operation a municipal plant which competes for the commercial business.

Furthermore, the decision in the quo warranto case was made on a vitally different record from that in this case. It is not unlikely that on this record the decision of the Ohio Supreme Court could have been the same as that of the District Court. This court in the Hawks case, stated the principle that the single decision of the state court to be followed should be clear and unequivocal. The quo warranto decision does not meet that requirement. In fact it is *not* a decision at all of the case made by petitioner in the courts below.

V.

The Rights Of The Predecessors Of Plaintiff's Mortgagor Were Not Terminated By Any Provision Of The Public Lighting Contract Of 1905.

We shall not repeat the argument contained in our main brief upon this feature, but will allude briefly to the wholly unjustified claim at page 119 of respondent's brief that the contract included within its scope rights with respect to commercial and residence lighting service. It will be noted by a reference to the clause in the contract of 1905 (see respondent's brief page 119) which did mention commercial and residence lighting, that it was for the sole purpose of preserving the right of the city to revoke the

street lighting rights, in the event the company should fail either to furnish street lighting or commercial and residence lighting no such failure ever occurred), and obviously had no other or further effect.

See also the opinion of the Supreme Court of Ohio in the quo warranto case, 121 O. S. 235, where the court said, speaking of the 1905 contract:

> "* * * no reference being made therein to commercial lighting * * * "
>
> (Appendix to respondent's brief, page 175).

VI.

The Respondent City Is Estopped To Deny That An Agreement As To Mode Of Use Has Always Existed.

At page 124 of its brief respondent sets forth an imperfect recitation of the bases of the estoppel which we claim.

The bases of the estoppel upon which we rely are set out at pages 84, 85 and 91 of our main brief.

Respondent claims that no estoppel can be predicated upon the construction of the plant and distribution system in 1890 because the ordinance was a grant to a partnership and conveyed no rights after 1910. The claim ignores the facts that *the ordinance ran to the successors and assigns* of the partnership and the council knew at the time that there was to be a corporate successor, and of course the corporate successors invested their money in the system with the full knowledge and acquiescence of the city. The generating plant erected in 1895 was of double the capacity required to furnish service both to the public and private needs of the city (R. 68) and would not have been built except upon the understanding that the company possessed a continuous right to serve private consumers (R. 73, 75). The claim at page 129 of respondent's

brief that the city took the position at conferences in 1914 between city officials and reprentatives of the Cleveland, Southwestern and Columbus Railway Company that the company was without right to occupy the streets after September 1, 1915 has no basis whatever in anything contained in the record at the pages cited or anywhere else. Respondent says that no claim of any franchise right, perpetual or otherwise, was ever made by any of the companies. There was no occasion for any such assertion until the Village challenged the company's right by the 1926 ordinances. The Village knew, however, that the various companies were openly and notoriously operating in the streets at all times obviously under a claim of continuing right. The duty was on the city to notify the company if it was dissatisfied with the mode of use. This is not a case of continued use of the streets after termination of a franchise. The point is the city by its conduct led the various companies to believe the mode of use was satisfactory. The city is therefore estopped to assert that there is no such agreement. Contrary to what respondent says at page 131 of its brief, there is evidence of capital investments after 1910. (R. 78, 84, 99). Respondent cannot help itself on the issue of estoppel by claiming as it does at pages 131, 132 that the equipment of petitioner's mortgagor in the City of Norwalk is in a sad state of repair upon the basis of fragmentary bits of evidence in the record. Neither can respondent avoid the estoppel by the statement at page 133 of its brief that it had nothing to do with the assessment of taxes and no standing to object thereto. The point is it received its portion of the taxes without objection. (R. 280.)

D.

CONCLUSION

Our omission to mention herein any other matters touched upon in respondent's brief is not to be construed as an admission of statements contained therein. We think any such matters are effectively disposed of in our principal brief.

Respectfully submitted,

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IN THE

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October Term, 1932

No. 290

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Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. RAY CRAIG, *Norwalk, Ohio,*
REX F. BRACY, *Norwalk, Ohio,*
E. G. MARTIN, *Norwalk, Ohio,*
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Toledo, Ohio,
Solicitors for Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

The City of Norwalk became a municipal corporation under the laws of the State of Ohio in 1859, and became a city under the laws of Ohio about April 4, 1881

(R. 38). Its population between 1890 and the present, the period involved in this litigation, has varied between 7,000 and 8,000, with no substantial change in territorial extent. (Plaintiff's Exhibit 1, R. 277.) Early in 1890, six men organized a partnership styled "The Norwalk Incandescent Light Company" for the purpose of generating and furnishing electricity in the City of Norwalk (R. 51). On July 30, 1890, upon application of The Norwalk Incandescent Light Company, the council of the City of Norwalk passed an ordinance entitled "An Ordinance to Grant Certain Privileges as Therein Set Forth to The Incandescent Light Company of Norwalk, Ohio." The first sentence of Section 1 of the ordinance is as follows:

> "Sec. 1. Be it ordained by the city council of Norwalk, Ohio, that The Norwalk Incandescent Light Company of Norwalk, Ohio, its successors and assigns are hereby granted *for the term of twenty years from the passage of this ordinance,* the right of way through, in and upon the streets, sidewalks, alleys and public grounds of the said city for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use the Heisler system of incandescent lighting in said city. * * *" (Italics ours.)
>
> (Exhibit A attached to the Second Amendment and Supplement to the Bill of Complaint, R. 35.)

On October 7, 1890, upon application of the aforesaid partnership, the council of the City of Norwalk passed an ordinance readopting the ordinance of July 30, 1890, with the exception that the limitation to the

Heisler system of incandescent lighting was omitted. That ordinance was accepted by the partnership (R. 36, 62, 63).

Shortly after the passage of the ordinance of July 30, 1890, the partnership constructed a generating plant and a distributing system throughout the city consisting of lines, poles, wires, and the usual attachments therefor and supplied the inhabitants of the city with electricity for domestic and commercial use (R. 53). A single system of pole lines carried two sets of wires, one for direct current for supplying electricity for street lighting, and the other for alternating current, supplying electricity for domestic and commercial use (R. 57). This system of pole lines, with a few additions and replacements is now operated by Ohio Electric Power Company, petitioner's mortgagor (R. 64).

In March, 1891, the partnership was succeeded in the operation of its electrical distribution system by a corporation styled "The Incandescent Light & Power Company," organized under the laws of Ohio, by members of the partnership and others; and thereupon the partnership transferred all of its property, including the franchise of October 7, 1890, by a written bill of sale to The Incandescent Light & Power Company, which continued the operation of the generating plant and electrical distribution system in the same manner as it had been conducted by the partnership (R. 54-62).

On May 17, 1895, The Northern Electric Company was organized under the laws of the State of Ohio

> "for the purpose of manufacturing and producing electricity for light, heat and power." (R. 289.)

On May 20, 1895, The Northern Electric Company purchased the generating plant and distribution system constructed by the partnership from individuals, who had previously purchased the same from assignees for the benefit of creditors of The Incandescent Light & Power Company, and proceeded to operate said plant and distribution system as it had previously been operated by its predecessors in title (R. 291). By mesne conveyances, these properties, franchises and rights were ultimately sold, transferred and assigned to petitioner's mortgagor, Ohio Electric Power Company, on May 22, 1925. Prior to the date of such conveyance, Ohio Electric Power Company had executed a mortgage and deed of trust to petitioner's predecessor in title as trustee, conveying to the trustee all of the real estate, franchises and personal property which Ohio Electric Power Company then owned, to secure mortgage bonds which might be issued under such mortgage (R. 379).

On May 25, 1925, Ohio Electric Power Company executed a supplemental mortgage to said predecessor trustee conveying, among other properties, the generating equipment and electrical distribution system in the City of Norwalk, and

> "also all such other contracts, franchises, rights, privileges and agreements of the grantor in the City of Norwalk, Ohio,"

to secure such first mortgage bonds as might be issued under the original mortgage (R. 412).

On March 23, 1926, the council of the City of Norwalk passed a resolution requesting Ohio Electric Power Company within 30 days thereafter to remove from the streets, alleys and other public places of the city its electrical equipment erected thereon (R. 444-446).

Ohio Electric Power Company having failed to remove its equipment, the city council, on May 18, 1926, passed a resolution ordering that complaint be filed with Edgar G. Martin, prosecuting attorney of Huron County, Ohio, requesting such officer to take such legal steps as might be provided by the laws of the State of Ohio in *quo warranto* to oust Ohio Electric Power Company from the streets, alleys and other public places of the city (R. 448, 449).

On May 19, 1926, Edgar G. Martin, as prosecuting attorney of Huron County, Ohio, filed, in the Court of Appeals of said county, a petition in *quo warranto* against Ohio Electric Power Company praying that Ohio Electric Power Company be required to answer by what warrant it occupied the streets, alleys and public places of the city, and that it be ousted from using the same.

Issue to said petition was made by the filing of an answer thereto by Ohio Electric Power Company and later by an amended answer claiming that it had erected and maintained poles, wires and other electrical equipment in the streets, alleys and other places in the City of Norwalk for the purpose of doing a commercial and private lighting business therein, and that, by virtue of franchises granted to it by the State of Ohio and the City of Norwalk, it had a perpetual right so to occupy said streets, alleys and other places.

On June 7, 1928, such action in *quo warranto* was submitted to the Court of Appeals on the pleadings and the evidence. The Court of Appeals found in favor of the State of Ohio and decreed and ordered that Ohio Electric Power Company be ousted from continuing the use and occupation of the public streets, lanes, alleys,

avenues and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes, and from using and exercising any and all said franchises, rights and privileges within the city limits of the said City of Norwalk, Ohio.

State of Ohio ex rel. Martin vs. Ohio Electric Power Company, 35 O. App. 481.

The opinion is appended hereto as "Appendix A."

The case was taken on error to the Supreme Court of Ohio by Ohio Electric Power Company. That court reviewed the proceedings and judgment of the Court of Appeals of Huron County, Ohio, and on June 12, 1929, affirmed said judgment and issued a mandate to the Court of Appeals to carry said judgment and order into execution.

Ohio Electric Power Company vs. State of Ohio ex rel. Martin, 121 O. S. 235.

The opinion is appended hereto as "Appendix B."

The bill of complaint in the present litigation was filed January 3, 1930 (R. 2).

After the hearing of the case, the District Court entered an order enjoining and restraining the city, its attorneys, officers, agents, employees and representatives

> "and all persons whomsoever to whom notice of this order shall come,"

from in any manner interfering with or interrupting the full exercise of any and all of the franchise rights of Ohio Electric Power Company, as found by the court,

"and from taking any steps, or doing any act to dismantle, wreck or remove any part of said existing system from the streets, alleys and public places of said city, and from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the *quo warranto* action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, decided May 21, 1928, which judgment was affirmed by the Supreme Court of Ohio on June 12, 1929, and from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster." (R. 241-242.)

The Circuit Court of Appeals, after hearing, ordered that as the alleged error in the state court decree was the sole ground for the relief sought and as the record showed no circumstances justifying equitable interference with said decree, the injunction issued should be set aside and the cause remanded with directions to dismiss the bill.

QUESTION PRESENTED

Has a Federal Court, in View of the Provisions of Section 265 of the Judicial Code, the Power to Enjoin a State Court From Enforcing a Valid Decree of Ouster Entered in Quo Warranto Proceedings Against a Corporation Upon Application of Such Corporation's Mortgagee?

ARGUMENT

1. THE DECREE OF THE DISTRICT COURT VIOLATES THE PROVISIONS OF SECTION 265 OF THE JUDICIAL CODE.

(a) The Relief Granted by the District Court Does Not Fall Within the Exceptions to the Prohibition Against Interference With State Court Action by Federal Courts.

Section 265 of the Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (Title 28, U. S. C. A., §379.)

This provision of the Judicial Code does not prevent the federal courts from enjoining state court proceedings which have the effect (1) of enforcing local statutes which are repugnant to the Constitution of the United States, or (2) of defeating or impairing the jurisdiction of the federal courts, or (3) of depriving a party from relief of a judgment under circumstances where its enforcement would be contrary to recognized principles of equity and standards of good conscience.

Wells Fargo & Co. vs. Taylor, 254 U. S. 175.

The present case does not fall within any of these three exceptions to the broad prohibition of the statute.

As the Circuit Court of Appeals pointed out, there has been no claim made that the judgment of the state

court is void or that it was based upon fraud or mistake of fact.

It is not claimed that Ohio Electric Power Company did not have a fair trial in the state courts or that it did not have ample opportunity of fully presenting its case or that there was any suppression of evidence or that there was any inequitable or unconscionable conduct on the part of the plaintiff in the state court proceedings. The sole claim of the petitioner is that it has presented its claim that the twenty-year limitation was not a binding covenant upon a different theory than the same claim was presented by Ohio Electric Power Company in the *quo warranto* proceedings in the state courts. (See page 26 of petitioner's brief.)

In all of the cases cited by petitioner wherein a federal court enjoined the prevailing party in a state court from enforcing a judgment obtained in the state court, the judgment was void or voidable on some well recognized equitable ground. In the case at bar, the most that can be claimed is that the mortgagor's trustee has not been heard upon the merits of its mortgagor's claim that it (the mortgagor) has a perpetual franchise to occupy the streets, alleys and public places of the City of Norwalk.

In *Wells Fargo Co. vs. Taylor, supra*, the plaintiff in the state court obtained a judgment against the railroad company which not only violated the plaintiff's agreement of employment with the express company, but perpetuated a fraud upon the express company. The judgment was, therefore, one which in equity and good conscience the plaintiff had no right to enforce. *Western Union Telegraph Co. vs. Tompa*, 51 F. (2d) 1032, is to

the same effect. No element of fraud exists in the case at bar.

In *Simon vs. Southern Ry. Co.*, 236 U. S. 115, it was held that the judgment obtained in the state court was void and being void the plaintiff acquired no rights thereby and could be enjoined by a federal court from attempting to enforce what was a judgment in name but a nullity in fact.

Atchison Ry. Co. vs. Wells, 265 U. S. 101; *The Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills*, 282 F. 811, *certiorari* denied 260 U. S. 749, and *Ballard & Ballard Co. vs. Munson Steamship Line*, 25 F. (2d) 252, are to the same effect. The judgment of ouster involved in this case is valid and binding in all respects.

The order of ouster entered by the state court not being void, voidable or issued under a mistake of fact, it is clear that the possibility that the enforcement of such order may affect the rights of persons not parties to the *quo warranto* case does not justify interference with the proceedings of the state court.

Phelps vs. Mutual Reserve Asso., 112 F. 453, 463;
Association vs. Hurst, 59 F. 1;
Mills vs. Providence Life & Trust Co., 100 F. 344;
Lehman vs. Spurway, 58 F. (2d) 227.

In *Old Colony Trust Co. vs. Omaha*, 230 U. S. 100, the question of interference with judicial proceedings was in no way involved. There the electric light company brought an action against the City of Omaha in the federal court to enjoin the enforcement of a munici-

pal ordinance. The bill of complaint was dismissed; the judgment of the lower court affirmed by the Circuit Court of Appeals; and the cause was then pending upon appeal in this court when the trustee under the electric light company's mortgage brought a new action in the same federal court to enjoin the enforcement of the same ordinance. The question ruled upon by the Supreme Court was whether the earlier decree was *res adjudicata* in the second case. It was not sought in the second case to interfere with the proceedings in the earlier case. This court had no occasion to consider the question of interference with judicial proceedings. Section 265 of the Judicial Code was in no way involved.

Without urging that the decision in the *quo warranto* case in the state courts is an adjudication against the petitioner of the issues in this case, respondent does, however, urge that the facts in this case do not entitle the petitioner to the relief prayed for.

(b) The Decree of the District Court Is a Direct Interference With the Proceedings of the State Court.

Petitioner ignores the distinction between the interference with the enforcement of money judgments and interference with the enforcement of a valid order of ouster issued in a *quo warranto* action.

In *State ex rel. Martin vs. Ohio Electric Power Co., supra,* the Court of Appeals of Huron County, Ohio, issued an order of ouster against the defendant. This order was issued under Section 12317 of the General Code of Ohio, which reads as follows:

"Sec. 12317. JUDGMENT WHERE OFFICE, FRANCHISE, ETC., FOUND TO HAVE BEEN USURPED. When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs."

It is an order by the court to the defendant and its violation is punishable by contempt proceedings.

See:

State vs. Cahill, 131 Iowa 236, 108 N. W. 453;

People vs. Mortenson, 224 Ill. App. 221 (1922).

In all the cases cited by petitioner, wherein a federal court enjoined the prevailing party in the state court from enforcing a judgment secured therein, the judgments were for money only. *Simon vs. Southern Ry. Co.,* 236 U. S. 115, is typical of cases relied upon by petitioner.

In all these cases, the plaintiff in the state court merely changed his claim from an unadjudicated claim to an adjudicated claim; and in order to secure payment the judgment creditor was required either to cause a levy of execution to be made or to commence new proceedings in another court.

As this court said, in the *Simon* case, when the plaintiff in the state court endeavors to use the judgment, which he has obtained, a new state of facts not within the language of the statute may arise which may warrant the federal court in an appropriate case to enjoin the enforcement of the judgment.

In the case of a judgment in *quo warranto*, the situation is materially different. The court orders the defendant to cease usurping the franchise and may enforce its order *sua sponte*. By an action in *quo warranto* the executive branch of the state government transfers to the judicial branch the duty of vindicating the state and protecting its citizens against a usurper. No further action by the officer of the executive branch of the government bringing the suit is required to make the judgment effective. To prevent the enforcement of the order of ouster, the injunction of the federal court must operate upon the state court and its officers. A direct interference with proceedings in the state court is, therefore, involved.

Cf:

Evans vs. Gorman, 115 F. 399;
Harrison et al. vs. Triplex Gold Mines, Ltd., et al., 33 F. (2d) 667, 672;
Russell vs. Detrick, 23 F. (2d) 175;
Western Union Telegraph Co. vs. L. & N. R. Co., 218 F. 628.

The well recognized principle, that a court will enjoin "that which purports to be a judgment but is, in fact, an absolute nullity," is the controlling reason which prevents the inhibition contained in Section 265, Judicial Code, from being universal in its scope.

This court, in *Wells Fargo & Co. vs. Taylor, supra*, declared that the provision of Section 265 of the Judicial Code was "designed to be in accord with, and not antagonistic to, our dual system of courts." The few types of cases, which constitute the exceptions, are classi-

fied in the *Wells Fargo* case as well as in the able and exhaustive opinion in *Russell vs. Detrick, supra.* In the latter case, it appeared that a suit had been instituted in a state court for the cancellation of certain securities of the value of $115,000.00 held by a state insurance commissioner as security for the payment of insurance policies issued to various parties. Detrick, the insurance commissioner, filed his bill in equity in the United States District Court and was granted an injunction by that court restraining the prosecution of the suit in the state court. Adverting to Section 265 of the Judicial Code, Circuit Judge Gilbert, at page 178, used the following language:

> "But the present case does not belong in the class of any of the recognized exceptions. It is an injunction against the plaintiffs in a state court, enjoining them against taking further steps in the prosecution of suits to cancel securities, and it is issued on behalf of plaintiffs in a federal court, not parties to the suits in the state court, to defeat cancellation of the securities and protect their own interest therein. We think the injunction comes clearly within the prohibition of Section 265."

Louisville Trust Co. vs. City of Cincinnati, 76 F. 296, is the only case we have found which discusses the power of a federal court to enjoin the enforcement of a judgment of ouster in *quo warranto* issued by a state court under Judicial Code Section 265.

The *Simon* case and the other money judgment cases relied upon by petitioner are not inconsistent with the statement, in the *Louisville Trust Co.* case, of Mr. Justice Lurton, then a circuit judge, that such an injunc-

tion constitutes a violation of Section 265 of the Judicial Code, and that the court could not enjoin the enforcement of a writ of ouster in *quo warranto* or proceedings to secure enforcement of such writ. We recognize that such an injunction was not involved in that case. In the *Louisville Trust Co.* case, the injunctional order only restrained the defendant "from taking into its own hands the enforcement of the decree of the state court." The court, also, pointed out, in substance, that it would be improper to enjoin the defendant from applying for any writ, which the state court might lawfully issue or to prevent the execution of such writ "although its execution might be destructive of the interests of the complainant."

(c) By Reason of the Nature of an Action in Quo Warranto in Ohio, the City Was Not and Could Not Be a Party to the Proceedings in Quo Warranto.

The respondent city was not a party to the *quo warranto* case. Under the Ohio *quo warranto* statutes, it could not bring a *quo warranto* action, and has no standing to secure the enforcement of the decree of ouster issued by the Court of Appeals of Huron County against Ohio Electric Power Company. It is, therefore, clear that the injunction granted by the District Court in the case at bar can have no effect unless it acts upon the Court of Appeals of Huron County itself and upon other persons not parties to this litigation and not representatives of the respondent city. This action constitutes an attempt to secure by indirection what cannot be secured directly by reason of the prohibition against

suits against the State of Ohio contained in the Eleventh Amendment to the Constitution of the United States and the prohibition against injunction with respect to state court proceedings contained in Section 265 of the Judicial Code. The allegations of the bill of complaint and the proof with respect to alleged direct interference by the city with the property of petitioner are mere subterfuges to cover the real purpose of petitioner, namely: to enjoin enforcement of the ouster decree in the *quo warranto* action. The Circuit Court of Appeals so viewed the situation.

In Ohio, judicial practice respecting the writ of *quo warranto* is controlled by constitutional and legislative provisions:

(1) By Section 2 of Article IV giving to the Supreme Court of Ohio original jurisdiction in *quo warranto*, and by Section 6 of the same article giving, also, to the Court of Appeals original jurisdiction in *quo warranto;* and

(2) By legislation, as shown at pages 31-35 of the (Appendix) brief of counsel for petitioner.

Not only necessarily must an action of this kind be brought in the name of the state, but the question of determining whether it shall be instituted is left either to the attorney general of the state or to the prosecuting officers of the proper county, who exercises his own discretion in the matter and, therefore, the state is the substantial party plaintiff in an action of this character where a corporation is assuming to exercise and enjoy a public franchise, without having such right granted to it by the proper public authorities.

In Ohio, it has become a civil action and, in disposing of an action in *quo warranto*, upon passing judgment, the duty devolves upon the court to exercise its sound discretion, as indicated in *State ex rel. vs. Mutual Benefit Association*, 42 O. S. 579, in which the court, among other things, held:

> "Whether a corporation which is shown, upon a *quo warranto* proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it."

Whatever rights petitioner may have acquired by virtue of its mortgage in the property of Ohio Electric Power Company were subject, as petitioner must have known when it took the bonds of the Power Company and accepted its mortgage, to a challenge by the State of Ohio to the mortgagor's rights in and to the streets of the City of Norwalk, Ohio.

2. THE PETITIONER'S CLAIM OF PERPETUAL FRANCHISE IS WITHOUT SUBSTANCE

(a) The Franchise Ordinance of October 7, 1890, Limited as It Was to a Twenty-Year Term, Constituted a Binding Agreement Upon Norwalk Incandescent Light Company and Its Successors, Including the Petitioner, Under the Decisions of This Court.

The electrical distribution system of Ohio Electric Power Company in the City of Norwalk was constructed by Norwalk Incandescent Light Company in 1890 under

the franchise ordinances of that year, which were limited in term to twenty years. Such term having expired, petitioner now claims a perpetual franchise by incorporation.

No franchise ordinance was ever granted by the City of Norwalk to any electric light corporation or person, after the one of October 7, 1890.

In *Bankers Trust Co. vs. City of Raton,* 258 U. S. 328, a similar claim was made. This court there ignored the question of the source of the franchise rights of the mortgagor, and held that construction and operation of the water system there involved under the franchise ordinance limited to twenty-five years, estopped the utility and its mortgagee from asserting a perpetual franchise by incorporation. Mr. Justice McKenna speaking for this court, in his opinion, at page 335, said:

> "We are not called upon to review in detail the contentions and consider their various elements. We concur in the view of the city that the Water Works Company is estopped by its contract with the city, evidenced by Ordinance No. 10 (which, we may remark, was ratified by a vote of the citizens of the city), and we construe it as the city construes it. From what act the power to enact it was derived we need not pronounce. We may say, however, that the Supreme Court of the state in *Raton Waterworks Co. vs. Raton,* 22 N. M. 464, 164 Pac. 826, said the franchise of the company was granted by an ordinance of the city, and certainly the bill in this case shows that its term was fixed at twenty-five years from July 25, 1891. The term, therefore, had expired when the amended bill was filed. The term of the rights having expired, necessarily the rights granted expired, and the city cannot be enjoined from requiring the removal of the company's system from the streets of the city."

In *Ohio Public Service Co. vs. State of Ohio ex rel. Fritz*, 274 U. S. 12, and in *Hardin-Wyandot Lighting Co. vs. Upper Sandusky*, 251 U. S. 173, this court held that municipal electric light franchise ordinances adopted between 1887 and 1896 were binding contracts enforcible against the municipalities involved. It follows that such ordinances are, also, binding against the utility, securing such rights, and its successors in title.

These cases and *Northern Ohio Traction Co. vs. State of Ohio*, 245 U. S. 574, in holding that municipal franchise ordinances without limitation in term are perpetual, are not in point here since the municipal ordinance here under discussion was definitely limited to a term of twenty years.

(b) Under the Statutes of Ohio and the Decisions of the Supreme Court of Ohio Construing the Same, Predecessors of Petitioner's Mortgagor Did Not Secure a Perpetual Easement to Use the Streets of Respondent City by Incorporation.

In *State of Ohio ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. App. 481, and *Ohio Electric Power Co. vs. State ex rel. Martin*, 121 O. S. 235, the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio held that the predecessors of petitioner's mortgagor did not secure a perpetual easement by incorporation in 1891 and 1895, respectively, but that agreement with the respondent city or an order of the Probate Court was required before any easement other than that conferred by the ordinance of October 7, 1890, limited to twenty years, could be secured. Since none of mort-

gagor's predecessors had entered into any agreement with the city, other than the twenty-year franchise, or had secured an order from the Probate Court, it was held that Ohio Electric Power Company, petitioner's mortgagor, had no continuing right to operate in the streets of respondent city.

Petitioner claims that these decisions constitute a deviation from the law as previously decided by the Ohio Supreme Court in *Zanesville vs. Zanesville Telephone & Telegraph Co.*, 64 O. S. 67; *Farmer vs. Columbiana Telephone Co.*, 72 O. S. 526; *Queen City Telephone Co. vs. Cincinnati*, 73 O. S. 64, and *Hardin-Wyandot Lighting Co. vs. Upper Sandusky*, 93 O. S. 428. A careful reading of these cases discloses that in none of them was the question of the nature of the rights of the utility under the situation presented in the present case involved.

Zanesville vs. Zanesville Telephone & Telegraph Co. holds that a right in the nature of a right of eminent domain was secured by a telephone company by incorporation under the magnetic telegraph statutes (Revised Statutes of Ohio, Sec. 3454 to 3471, inclusive).

The right of eminent domain is subject to termination until exercised.

Sears vs. City of Akron, 246 U. S. 242.

Such right in the case of electric light companies was terminated by the Act of April 21, 1896, set forth at page 37 of petitioner's brief.

Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 251 U. S. 173.

In *Farmer vs. Columbiana Telephone Co.*, both parties to the litigation conceded the validity of the municipal franchise there involved, the only question being the validity of a provision for free service.

Queen City Telephone Co. vs. Cincinnati holds that in order to bring action in Probate Court to secure an easement, incorporation must be proved, such decision being in accord with the decision of *Zanesville vs. Zanesville Telephone & Telegraph Co., supra,* that by incorporation only a right of eminent domain is secured.

In *Hardin-Wyandot Lighting Co. vs. Upper Sandusky, supra,* a municipal franchise ordinance was enforced against the utility. No effect was given to the perpetual right alleged to have been secured by incorporation.

Under the Ohio statutes, prior to 1896, agreement with the city or an order of Probate Court was required before a vested easement could be secured, and after 1896 such vested easement could be secured only by agreement with the city. In the instant case, the only agreement with the city was made by the partnership, which could secure no right under the incorporation statutes. This agreement was limited in term to twenty years. The decision of the Ohio courts in *State ex rel. Martin vs. Ohio Electric Power Co.* giving effect to such twenty-year limitation is in no way inconsistent with the earlier decisions of the Supreme Court of Ohio and is a reasonable and proper interpretation of the Ohio statutes, bearing in mind the well settled rule that

> "one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them,

come prepared to show that they have been conferred in plain terms, for nothing passes by grant except it be clearly stated or necessarily implied."

Blair vs. Chicago, 201 U. S. 400, 463.

See also:

Louisville Trust Co. vs. Cincinnati, supra, 308.

Even if we assume that there has been a change in the course of Ohio judicial decisions relative to electric light franchises, it does not follow that the federal courts are bound by the earlier decisions rather than by the latest pronouncement of the Supreme Court of Ohio as to the law of the state on this subject. The doctrine announced in *Gelpcke vs. City of Dubuque*, 1 Wallace 175, 68 U. S. 175, applies to the particular facts involved in that case, and has never been extended further than therein announced.

In *Great Northern Ry. Co. vs. Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 153, we find the latest expression of this court regarding the law applicable to intermediate transactions where a court has reversed a former holding, wherein this court accepted the construction given to a state statute by the highest court of the state.

The present situation is not analogous to the situation in *Gelpcke vs. Dubuque* where municipal bonds of a particular type had been held valid by the Supreme Court of Iowa prior to their issuance by the defendant and were held invalid after their issuance. In the case at issue the defendant has not attempted to deny the validity of its own contractual obligations. The distinc-

tion is recognized in *Hill vs. Elizabeth City*, 291 Fed. 194, 210. In that case the bondholders of a municipal electric light, power and water system attempted to assert an estoppel against a change of decision by the North Carolina courts upon the question of whether the construction of a municipal plant constituted a necessary expenditure. The federal court refused to apply any such extension of the doctrine of *Gelpcke vs. Dubuque*.

3. ENFORCEMENT OF A VALID STATE COURT JUDGMENT CANNOT BE ENJOINED BY A PERSON NOT A PARTY TO SUCH STATE PROCEEDINGS UPON THE GROUND THAT SUCH PERSON HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

As the Circuit Court of Appeals, in the instant case, said, the decree of the state court is not an adjudication against the petitioner, which was not a party to the *quo warranto* action. It does not follow, however, from that fact that the petitioner has been deprived of its property without due process so as to give the federal court jurisdiction to restrain enforcement of the state court's judgment upon the ground that the Fourteenth Amendment to the Federal Constitution has been violated.

In *Bristow Battery Co. vs. Board of Commissioners*, 37 F. (2d) 504, *certiorari* denied 282 U. S. 843, as the reviewing court pointed out, the bill of complaint in substance asked a federal court to review the rulings of the State Supreme Court in a case to which the complainant was not a party and to hold that the State Supreme

Court was in error. Such a contention, the court held, does not present a federal question, since even an erroneous decision does not deprive the unsuccessful party, or others not parties to the litigation but affected thereby, of property without due process of law within the Fourteenth Amendment to the Constitution of the United States.

In *Association vs. Hurst, supra,* Mr. Chief Justice Taft, then circuit judge, in announcing the judgment of the Circuit Court of Appeals, Sixth Circuit, that the sale of land by a sheriff under an execution issued by a state court can not be enjoined, "even though the land levied upon belongs to a stranger to the proceedings," used the following language relative to the construction of Section 720, Revised Statutes, now Section 265, Judicial Code:

> "That section was passed, not to preserve comity and harmonious action between courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereigns exercising concurrent jurisdiction over the same territory. The purpose of the statute is so important that a liberal construction should be given to accomplish it."

As was pointed out in the *Bristow Battery Company* case, *supra,* and the authorities there cited, the decision of a state court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment to the Federal Constitution merely because it is wrong or because earlier decisions are reversed.

It is the contention of respondent that the judgment and decree of the District Court run counter to the letter and spirit of said Section 265 of the Judicial Code, and that the order of the Circuit Court to dissolve the injunction and dismiss the bill is in conformity with the inhibition of that section and the decisions of this court.

The order of ouster granted by the State Court of Appeals is not void or voidable. Neither was it issued under any mistake of fact. There is no claim that it was in any wise tainted by fraud. It did not in any manner affect or interfere with the jurisdiction of the federal courts. That there is a possibility that the enforcement of such order may affect or interfere with the rights of third persons not parties to the *quo warranto* proceeding does not afford any basis for interference with the proceedings of the state court by the injunctive process of a federal court. The *quo warranto* proceeding was instituted by the State of Ohio. The matter of instituting such proceeding was entirely lodged in the sound discretion of the prosecuting attorney. The state courts found for the State of Ohio.

CONCLUSION

Petitioner is merely attempting to obtain a readjudication of the law and facts adjudicated by the state courts of competent jurisdiction in the *quo warranto* proceeding, to which its mortgagor was a party. Inasmuch as the decision of the Circuit Court of Appeals of the Sixth Circuit rendered in the present case does not conflict with prior decisions of this court, or any other federal court, and none of the conditions essential for

the exercise by a federal court of its power to enjoin the enforcement of a judgment of a state court is present, the writ prayed for herein should be denied.

Respectfully submitted,

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APPENDIX "A"

The State, ex rel. Martin, Pros. Atty.,

Plaintiff,

vs.

The Ohio Electric Power Co.,

Defendant.

In the Court of Appeals, Huron County, Ohio

OPINION

Municipal corporations—Written acceptance of ordinance granting partnership use of streets, unnecessary—Incorporation of public service company sufficient acceptance, when—Statutes granting electric companies street privileges contemplate incorporated companies only—Sections 9170, 9178, 9179, 9191, 9192, 9193, and 9194, General Code—Rights greater than given by ordinance cannot be claimed by assignee, when—Estoppel not created by use after franchise ordinance expired.

1. Where ordinance of municipality granting partnership a franchise to furnish electricity was silent as to manner of acceptance thereof, but partnership thereafter installed the necessary equipment and furnished and distributed electricity in municipality until incorporation of company by members of partnership to take over and conduct its business, to which all of the partnership property was transferred, the corporation thereafter continuing to furnish and distribute electricity as had the partnership theretofore, formal acceptance of the ordinance was not necessary.

2. Statutes granting privileges in streets to electric companies did not contemplate partnerships or individuals, but only incorporated companies.

3. Electric company, as assignee of partnership, having relied solely on ordinance granting to partnership, its successors and assigns, use of streets for a definite period, could not after expiration thereof, claim to possess any greater rights than the ordinance gave.

4. The continued use by the defendant of the streets and the furnishing and distribution of electricity within the municipality, after the expiration of the franchise granted by the ordinance, without further acquiring the right to do so in the manner provided by law, did not create an estoppel against the municipality in favor of the defendant.

(Decided May 21, 1928)

IN QUO WARRANTO

Mr. Edgar G. Martin, prosecuting attorney, Mr. G. Ray Craig and Mr. Charles Suhr, for plaintiff.

Messrs. Fauver & Fauver and Mr. W. R. Pruner, for defendant.

Lloyd, J. This is an action in quo warranto, whereby the plaintiff, the State of Ohio, on relation of Edgar G. Martin, prosecuting attorney of Huron County, seeks to oust the defendant, The Ohio Electric Power Company, from using the public streets, lanes, alleys, avenues, and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires, and electrical equipment for the distribution of electricity for heat, light, and power purposes in said municipality.

The defendant is a corporation, incorporated in August, 1924, under the laws of Ohio, for the purpose, among others, of engaging in the business of operating power plants with the necessary appliances, equipment, etc., for furnishing and distributing electricity for private and public consumption, and since 1922 has been furnishing electricity to such of the people of Norwalk as choose to become its customers.

In 1890 six men, of whom there is now but one resident survivor, formed a partnership under the name of the Norwalk Incandescent Light Company to furnish electricity in the City of Norwalk for commercial purposes. Thereafter, upon application of the partnership therefor, the City of Norwalk, by ordinance passed October 7, 1890, granted to it, its successors and assigns for the term of twenty years, "a right of way through, in and upon the streets, sidewalks and alleys and grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city."

That ordinance contains certain restrictive conditions as to the height and location of the poles, and provides that "this grant of way is not exclusive." It contained no provision or condition as to how or in what manner the grantee should indicate its acceptance thereof, but the necessary equipment was installed by the partnership, and it thereafter conducted its business of furnishing and distributing electricity in Norwalk until the incorporation in March, 1891, of The Incandescent Light & Power Company of Norwalk, Ohio, for the pur-

pose of "furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, * * * electric * * * power and * * * electricity for heating, for profit." In our judgment this was in law an acceptance thereof, and a formal written acceptance under these circumstances was unnecessary.

The Incandescent Light & Power Company of Norwalk, Ohio, was incorporated by the members of the partnership and one or two others, and upon its incorporation the partnership transferred to it all of the partnership property, and it proceeded to use the plant and equipment of the partnership to furnish electricity for lighting and commercial purposes in Norwalk. It continued so to do until February, 1893, when it filed in the Probate Court of Huron County a general deed of assignment for the benefit of creditors. By this deed it conveyed and assigned to the assignees named therein "all of its property of every nature and kind whatsoever." By a deed of the assignees, pursuant to an order of sale issued by the Court of Common Pleas, to which an appeal had been taken from the Probate Court, all of the property, including "all franchises, patronage and good will and rights of said business" of The Incandescent Light & Power Company, was conveyed and transferred on March 7, 1895, to George F. Jones and Mayme C. Foster, their heirs and assigns, who by deed dated May 20, 1895, by similar description, conveyed the property so acquired by them to The Northern Electric Company, "its successors, heirs and assigns." Thereafter, on May 8, 1900, the grantee corporation conveyed this property by like description to The Norwalk Gas & Electric Company, its successors and assigns. On July

16, 1895, the City of Norwalk entered into a contract with The Northern Electric Company for lighting the streets, alleys, etc., of the city for a period of ten years from September 1, 1895, which contract, by consent of the city, was assigned to The Northern Gas & Electric Company, and by the latter company, with consent of the city, assigned to The Cleveland Southwestern Traction Company; and on April 13, 1905, a second contract for street lighting for a period of ten years from September 1, 1905, was entered into by the city with The Cleveland Southwestern Traction Company.

The Norwalk Gas & Electric Company owned and operated the property and business until February 14, 1903, when it conveyed and transferred all of its property, franchise rights, and privileges to The Cleveland Southwestern Traction Company, its successors and assigns, by which company the property so described was conveyed and transferred to The Cleveland, Southwestern & Columbus Railway Company, which in turn, on March 1, 1924, conveyed and transferred it to The Cleveland Southwestern Railway & Light Company. On December 31, 1924, the last above named company, with the consent of the Public Utilities Commission of Ohio, transferred by bill of sale to one Victor Emanuel, by specific description, certain tangible personal property in Norwalk and "all distributing power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines and poles of the grantor, approximately 5.2 miles of lines on poles of others than the grantor, and approxi-

mately 4.3 miles of lines on poles owned jointly by the grantor and others, together with all right, title and interest of the grantor in and to the poles so occupied jointly."

On May 22, 1925, Victor Emanuel executed to the defendant, The Ohio Electric Power Company, a bill of sale for the above property in the identical language and form of the conveyance to him from The Cleveland Southwestern Railway & Light Company. Also on December 31, 1924, The Cleveland Southwestern Railway & Light Company conveyed to said Emanuel "all such right and title as it has or ought to have in the following described premises,—describing certain rights of way and other personal property—and "all right, title and interest of the grantor in and to any rights of way for a pole line, pole line rights, pole lines, poles and any licenses, franchises, easements or grants for said purposes possessed or enjoyed by the grantor in the City of Norwalk, Ohio, and/or used in connection with the distribution of power, light and heat by the grantor in said city."

On May 22, 1925, Victor Emanuel, in consideration of $10 and other good and valuable considerations, sold, assigned, and quit-claimed to The Ohio Electric Power Company, its successors and assigns, certain specifically described property, and all contracts, franchises, grants, rights and privileges in the City of Norwalk acquired from The Cleveland Southwestern Railway & Light Company.

The relator contends that the defendant has no right to occupy the streets, alleys, and public places in the City of Norwalk with its poles, wires, etc., for the

distribution of electricity therein, for the reason that the franchise granted by the municipality to the partnership, the Norwalk Incandescent Light Company, expired by limitation on October 7, 1910, and, the city not having thereafter consented to such use and occupation of its streets and other public places, the rights and privileges so granted, thereupon ceased. The defendant claims, first, that by legislative enactment passed January 26, 1887, and operative until April 21, 1896, when it was materially changed by amendment, its predecessors in the right to occupy the streets and public ways and places of Norwalk obtained such privilege and authority directly from the state, and that, as the successor to them, by conveyance and assignment, it now possesses the rights and privileges so acquired; and, second, that the City of Norwalk, having permitted defendant and its predecessors in title to continue to so occupy its streets and public places and furnish commercial and private lighting in the municipality, is now estopped to deny the right of respondent to so conduct its business in Norwalk and to occupy the streets and public places thereof for such purposes.

Chapter 2, Subdivision 2, Division 2, Title IX of Part II of the General Code, relates to telegraph and telephone companies, and Section 9170 thereof, formerly Section 3454, Revised Statutes, provides that "A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof."

Section 3471, Revised Statutes, now Section 9191, General Code, made the provisions of this chapter applicable also to telephone companies.

Section 3471a, Revised Statutes, now Sections 9192, 9193 and 9194, General Code, as originally enacted January 26, 1887, 84 Ohio Laws, 7, provided: "The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

This statute continued in force until April 21, 1896, when it was amended, 92 Ohio Laws, 204, and as amended provided that "every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies," and that, "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating of power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality."

Section 3461, Revised Statutes, now Sections 9178 and 9179, General Code, relates to appropriation proceedings by telegraph companies, and by enactment of Section 3471a, Revised Statutes (Section 9192, General

Code), became applicable to electric light and power companies. This section (Section 3461, Revised Statutes) provides in substance that the "mode of use" by any such company of the streets, alleys, etc., of any city or village, shall be such as shall be agreed upon by the municipal authorities thereof and the company, and, if they are unable to agree, the Probate Court in proceedings brought therein shall direct in what mode such line shall be constructed along such streets, alleys, etc. It is apparent, therefore, that on October 7, 1890, when the ordinance was passed by the City of Norwalk granting to the partnership, the Norwalk Incandescent Light Company, its successors and assigns, the right to occupy the streets and public places of the city for the purposes therein stated, and thereafter, until April 21, 1896, when Section 3471a was amended (92 Ohio Laws, 204), neither a partnership nor any other person or company engaged in a like business was privileged to occupy the streets, alleys, etc., of any municipality in Ohio without either an agreement with the municipality or an order of the Probate Court directing the mode of such occupancy. It seems to us that neither a partnership nor an individual was contemplated by or designated in these statutory provisions. Their context seems clearly to indicate that the privileges thereby granted by the state applied only to incorporated companies. If this conclusion is correct, then not only the right to use, but the mode of use, could have been acquired by the partnership not otherwise than with the consent of the municipality expressed in an ordinance conferring those privileges. This the City of Norwalk did by the ordinance of October 7, 1890, limiting therein the right to use and the

mode of use to twenty years from that date. The partnership, therefore, and its successive assignees, acquired the right to occupy the streets, alleys, etc., of Norwalk from the city and not from the state. Surely an electric light and power company upon which the state has conferred certain rights, conditional upon complance with the legislative enactments creating them, may not as an assignee of a partnership or an individual acquire the rights so granted in derogation of the authority conferring them.

Any of the corporate assignees of the partnership could at any time have sought to agree with the municipal authorities as to the mode of use of the streets, alleys, etc., of the city in the exercise of their corporate functions and authority; and, if agreement between them was not possible, might have instituted proceedings in the Probate Court of Huron County to effect this purpose. The Northern Electric Company which last occupied the streets, etc., of Norwalk, prior to April 21, 1896, when Section 3471a, Revised Statutes, was amended, might have so proceeded at the expiration of the time fixed in the ordinance. Not having done so, and having relied solely upon the ordinance, with its restrictive terms and conditions, until the time within which the proceedings authorized by Section 3461, Revised Statutes, might have been invoked had elapsed, we are of the opinion that the respondent cannot now claim to be possessed of any greater rights than the ordinance gave. If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its

agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. (State, ex rel., vs. Central Union Telephone Co., 11 C. C. 55, 5 C. D. 311.)

The views we have here expressed and the conclusion at which we have arrived are not in conflict with the decision of the United States Supreme Court in Ohio Public Service Co. vs. Ohio, ex rel. Fritz, 274 U. S. 12, 47 S. Ct. 480, 71 L. Ed. 898, for the reason that the franchise there involved was for an unlimited time. Being of the opinion also that the doctrine of estoppel has no application to the facts here presented, we conclude that the prayer of the relator should be granted.

Judgment accordingly.

Richards and Williams, JJ., concur.

(Vol. 35, Ohio App. Rep. 481.)

APPENDIX "B"

IN THE SUPREME COURT OF OHIO

No.....

Ohio Electric Power Co.,
Plaintiff in Error,

vs.

The State, ex rel. Martin, Pros. Atty.,
Defendant in Error.

Error to the Court of Appeals of Huron County

Per Curiam
OPINION

Municipal corporations — Twenty-year electric light franchise granted in 1890 (84 O. L., 7)—Perpetual right to occupy streets not acquired from state, when—Nor by acquiescence or non-action of public officials or through estoppel.

(No. 21302—Decided June 12, 1929.)

Messrs. Fauver & Fauver, and Mr. W. R. Pruner, for plaintiff in error.

Mr. Edgar G. Martin, Mr. G. Ray Craig, and Mr. Charles Suhr, city solicitor, for defendant in error.

By the Court: This is an action in quo warranto, originating in the Court of Appeals of Huron County, wherein is challenged the right of the defendant, the Ohio Electric Power Company, to maintain its poles, wires, and electrical equipment in the streets, alleys, and

public places in the City of Norwalk for the purpose of distributing and supplying electric current for commercial and private lighting, and plaintiff prays an order ousting the defendant therefrom. The Court of Appeals on hearing found for the plaintiff and ordered a decree of ouster as prayed for in the petition. Thereupon a petition in error was filed in this court.

The rights of the respective parties may readily be ascertained from a consideration of the facts disclosed by the record. The defendant, the Ohio Electric Power Company, became the owner of the property concerned, and of certain rights, privileges, and franchises, by successive grants from the Northern Electric Company, a corporation formed April 30, 1895. Shortly after its incorporation, to-wit, May 20, 1895, the Northern Electric Company procured a transfer to itself of the property, including all rights and franchises, theretofore belonging to the Incandescent Light & Power Company, a corporation organized March 7, 1891, and had acquired a 20-year franchise, which in 1890 had been granted to the Norwalk Incandescent Light Company, a partnership. The grant by the municipality to the partnership, which thereafter incorporated and became the Incandescent Light & Power Company, was for a stipulated and expressly limited term of 20 years, and granted a right of way upon the streets, alleys, and public grounds of said city for the purpose of therein erecting and maintaining necessary poles and wires to provide and successfully operate a system of incandescent lighting. No written acceptance was provided for, nor shown in the record, but it does appear that the ordinance was enacted upon the application of the partnership, members of which

attended the meeting of council and personally accepted the grant, and thereupon the grantees entered upon, and thereafter the company which took over the property of the partnership continued to operate, the plant and lines constituting the only lighting system then existing in the City of Norwalk. Said company was incorporated in March, 1891, its purpose being the furnishing to the citizens of Norwalk and vicinity electric current for lighting, power, and heating. Later, through an assignee for creditors, and by order of court, all the property of said company, including "all franchises, patronage, good will and rights of said business," were sold and transferred to certain individuals named, who, in May, 1895, by conveyance of similar purport and description, transferred the same to the Northern Electric Company. By like description the same property was on May 8, 1900, conveyed to the Norwalk Gas & Electric Company, which had been organized and incorporated under the laws of Ohio April 17, 1900.

Thereupon the council of the City of Norwalk consented to an assignment of a 10-year contract for street lighting to the last named company, which contract had been entered into by the city and the Northern Electric Company in July, 1895. By a similar description said property was transferred to the Cleveland & Southern Traction Company in February, 1903. In April, 1905, the latter company entered into a contract with the City of Norwalk for street lighting in anticipation of the expiration of the former contract, no reference being made therein to commercial lighting; but the contract did provide for the erection and maintenance of poles, etc., under the "restrictions and limitations imposed by said

city," and contained the express provision that "nothing herein contained shall permit said use or occupation of said streets, alleys, and other public places after the expiration of this contract, to-wit, August 31, 1915." That contract further provided as follows: "The said contractor, at the expiration of this contract, shall upon request of the said city remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys, and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after 30 days' notice from said city the same may be done by said city or its agents, and said contractor shall pay to said city all costs and expenses thereby incurred."

It is to be observed that no franchise was given for electric light or power purposes, or grant of any character made by the council of the City of Norwalk, subsequent to the 20-year franchise, and that franchise by its express terms expired in 1910, and no contract of any kind or character relative to the furnishing and distribution of electric current, except street lighting contracts above referred to, was entered into by and between the city and either of said companies. The defendant in this action acquired whatever property and rights it has, which are involved herein, by successive grants from the Cleveland & Southern Traction Company.

This record discloses that the City of Norwalk erected a municipal plant in 1915, and constructed, and has since maintained and operated, a complete system, whereby it supplies current for all its street lighting and

also meets the demand for most of the current consumed for private and commercial use in the city.

Under the facts presented by the record the claim of the defendant that by reason of the occupancy of the streets of the City of Norwalk its predecessor obtained a perpetual right to occupy said streets, to which right this defendant has succeeded, cannot be sustained. Under the law as it stood in 1890, when such 20-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself. Authority was conferred only upon incorporated companies designated by statute to so occupy the streets of a municipality, and then only by conforming to the method of procedure prescribed by statute. Concededly no franchise was ever granted, and no agreement with reference to the use and occupancy of the streets ever entered into, except as hereinbefore stated, and no application was made to or action taken by the Probate Court under the statute.

The cases dealing with unlimited franchise grants have no application here. The companies which successively acquired the property and rights of the grantee of the 20-year franchise necessarily accepted the burdens as well as the benefits of that franchise. They could not take the grant free from the limitations expressly imposed. That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed.

Mere acquiescence in the continued unauthorized occupancy of the streets, or non-action on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding.

Judgment affirmed.

Marshall, C.J., Robinson, Jones, Matthias, Day and Allen, JJ., concur; Kinkade, J., not participating.

(121 Ohio State, p. 235.)

IN THE

Supreme Court of the United States

October Term, 1933

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

On Writ of Certiorari to United States Circuit Court of Appeals—Sixth Circuit

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BRIEF OF RESPONDENT

G. RAY CRAIG, *Norwalk, Ohio,*
REX F. BRACY, *Norwalk, Ohio,*
E. G. MARTIN, *Norwalk, Ohio,*
W. A. EVERSMAN, *Toledo, Ohio,*
H. C. LAUGHLIN, *Toledo, Ohio,*
Counsel for Respondent.

WILLIAMS, EVERSMAN & MORGAN, *Toledo, Ohio,*
Of Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1933

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE OF THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF IN BEHALF OF RESPONDENT

OPINIONS BELOW

As stated in petitioner's brief, the opinion of the District Court for the Northern District of Ohio, Western Division, is not officially reported and the opinion of the Circuit Court of Appeals for the Sixth Circuit is found in 63 Fed. (2nd) 911.

The respective decisions of the courts of Ohio directly involved in this litigation are styled and reported as follows:

State ex rel. Martin vs. The Ohio Electric Power Co., 35 Ohio App. 481;
Ohio Electric Power Co. vs. The State, ex rel. Martin, 121 O. S. 235.

These opinions are set forth in full in Appendix B (*infra*, pp. 163 to 180).

STATEMENT OF THE CASE

The statement of petitioner in its brief being so long and involved, respondent will only attempt to submit an outline statement of the facts disclosed by the Record, and that mainly for the purpose of correcting several inaccuracies and omissions in the statement contained in petitioner's brief.

1. 1890-1891—The Norwalk Incandescent Light Company, a partnership, organized. Council of the City of Norwalk granted 20-year franchise to partnership. Electrical system built and put into operation by partnership. (R. 51; R. 35; R. 36; R. 53.)

Important Facts:

(a) Norwalk Incandescent Light Company, a partnership, secured no rights under Ohio General Corporation Act. (R. 51.)

(b) Franchise Ordinance limited to 20 years expired October 7, 1910. (R. 35; R. 36.)

(c) Present electrical distribution system involved in this case erected under this 20-year franchise ordinance. (R. 64.)

2. 1891-1893—The Incandescent Light & Power Company, an Ohio corporation, organized. Secured transfer of electrical distribution system of partnership and 20-year franchise. (Ex. 3, R. 282; R. 54-62.)

Important Facts:

(a) There is no evidence that the Norwalk City Council had any knowledge of intention of partners to organize a corporation at the time of the granting of the 20-year franchise ordinance. Judge Suhr, the only witness testifying upon the subject, stated that he had no recollection on this point. (R. 61.)

3. 1893-1895—Electrical distribution system in Norwalk operated by J. W. Foster and F. H. Jones, assignees for the benefit of creditors of The Incandescent Light & Power Company. (Ex. 4, R. 285.)

4. May 7, 1895—Electrical system purchased and operated by George P. Jones and Mayme C. Foster, as individuals. (Ex. 71, R. 473; Ex. 5, R. 287.)

5. 1895-1903—Northern Electric Company, an Ohio corporation, organized. Secured transfer of electrical system from Jones and Foster and operated the same. (Ex. 6, R. 289; Ex. 7, R. 291.)

Important Facts:

(a) Entered into 10-year public lighting contract with respondent city July 16, 1895, providing as follows:

"In further consideration of the premises, said company further covenants and agrees with said city that for the purpose of furnishing power and generating electricity for said arc and incandescent lights, it will build and construct in said city and during said period of ten (10) years will continuously keep in operation a first class electric light plant; which shall con-

sist of a brick and stone building of sufficient size and convenient construction, with a brick smoke-stack, to be equipped during all of said period with all the modern appliances for furnishing and maintaining good, regular, continuous and satisfactory lighting service." (Ex. G, R. 535.)

(b) Northern Electric Company erected generating plant pursuant to such public lighting contract.

6. 1903-1924—Electrical system operated by The Cleveland and Southwestern Traction Company, The Cleveland, Southwestern & Columbus Railway Company, and The Cleveland, Southwestern Railway & Light Company. Public lighting contract of April 13, 1905. (Ex. 11, R. 309; Ex. 12, R. 313; Ex. 27, R. 370; Ex. H, R. 541.)

Important Facts:

(a) The Cleveland and Southwestern Traction Company entered into public lighting contract of April 13, 1905, with respondent city, providing in part as follows:

"Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its said lamps, wires, poles and apparatus, but in such use of said streets, alleys, and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon said use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this contract or prevent said contractor from carrying out the same, *and provided further that nothing herein contained shall permit said use or occupation of said*

streets, alleys and other public places after the expiration of this contract, to-wit: August 31, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns hereunder, or from revoking the grant of said rights for non-user or misuser thereof through failure of said contractor or assigns to furnish such street, commercial and residence lighting to the said city, and the residents and inhabitants thereof, or otherwise.

"The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred." (Ex. H, R. 548.) (Italics ours.)

The contract also provided that should the utility

"fail to supply all demand for electrical energy for commercial and residence lighting, * * * then and in either of such cases of failure as aforesaid the said contractor shall lose and forfeit all his rights acquired under this contract." (Ex. H, R. 548.)

(b) The Cleveland, Southwestern & Columbus Railway Company in 1914 requested a new franchise to operate the electrical system in the respondent city in an attempt to forestall erection of a municipal plant. (R. 135, 136, 137, 201, 202; Ex. 80, R. 503.)

(c) In 1916 the municipal plant was put into operation. This plant now supplies all public lighting and three-fourths of the current consumed for private and commercial purposes.

7. July 1, 1924—Ordinance of the City of Norwalk regulating the construction and maintenance of wires and pole lines conducting electrical energy enacted. (Ex. 38, R. 438.)

Important Facts:

(a) Ordinance does not purport to grant rights to any company to use streets but is merely police power ordinance.

(b) On the date of passage, wires coming within the provisions of the ordinance were maintained and operated by following companies:

The Norwalk Telephone Company,

The American Telephone & Telegraph Company,

The Ohio Bell Telephone Company,

The Cleveland and Southwestern Railway & Light Company,

The Western Union Telegraph Company,

The Lake Shore Electric Railway Company,

The Sandusky, Norwalk & Mansfield Electric Railway Company,

The New York Central Railway telegraph lines,

The Wheeling and Lake Erie Railway telegraph lines. (R. 178.)

8. 1924-1925—Ohio Electric Power Company organized. Mortgaged its properties. Thereafter secured title to electrical system in Norwalk and executed supplemental mortgage covering the same. (Ex. 21, R. 351; Ex 28, R. 391; Exs. 22 to 25, R. 355 to 363; Ex. 29, R. 379.)

Important Facts:

(a) Only bonds now outstanding are $2,248,500 First Mortgage Gold Bonds 5% Series due 1957, the first of which were issued June 20, 1927, which was after the filing of the *quo warranto* case in the Court of Appeals of Huron County against Ohio Electric Power Company. (Ex. 31, R. 425; Ex. 32, R 428; Ex. 83, R. 513.)

(b) The electrical distribution system now operated by Ohio Electric Power Company in respondent city is the same physical property that was erected by The Norwalk Incandescent Light Company in 1890 under the 20-year franchise ordinance of that year, with minor additions and replacements. Its title thereto was secured from Victor Emanuel, an individual. (R. 64, Exs. 22 to 25; R. 355 to 363.)

9. 1926-1929—State of Ohio ex rel. E. G. Martin, Prosecuting Attorney of Huron County, vs. Ohio Electric Power Company, the *quo warranto* case against petitioner's mortgagor filed. Judgment of ouster entered by Court of Appeals of Huron County, Ohio, affirmed by Supreme Court of Ohio.

Important Facts:

(a) *Quo warranto* case was brought by the State of Ohio on the relation of the prosecuting attorney of Huron County, Ohio, and not by respondent herein.

(b) Respondent herein agreed to maintain and did maintain *status quo* with reference to property of petitioner's mortgagor from 1926 until decision of quo warranto case. (R. 104.) The removal of poles belonging to a telephone company by a city employe because they constituted a menace to life and property was not violation of this agreement but was immediately stopped when employee's superior and the city solicitor learned of the act. (R. 148-150; Ex. 62, R. 466; R. 146-147.)

(c) Decisions of the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio in this *quo warranto* case, construing the statutes relative to easements for electrical distribution, are *contra* to the position herein asserted by petitioner.

State ex rel. Martin vs. The Ohio Electric Power Co., 35 Ohio App. 481, May 21, 1928.

Ohio Electric Power Co. vs. The State ex rel. Martin, 121 O. S. 235, June 12, 1929.

(For opinions see Appendix B, *Infra*, pp. 163 to 180.

10. 1930-1933—Present litigation.

Important Facts:

(a) Alleged statements of G. Ray Craig to E. F. Boxell relative to Mr. Craig's attitude towards present litigation made while Mr. Craig had not yet been employed to represent respondent in this action. (R. 109, 115.)

(b) District Court entered injunction decree in following language:

"It is, therefore, ordered, adjudged and decreed that as long as The Chase National Bank of the City of New York, plaintiff, or its successors in trust, or the holders of bonds heretofore issued secured by the mortgage and the supplemental mortgage thereto, described in the bill of complaint, or any person, firm or corporation claiming by, through or under them, or either of them, have as such any interest in the properties and franchises described in the bill of complaint and the several amendments and supplements thereto herein, and as long as any holders of mortgages or bonds executed and delivered in payment of or substitution for, or in refunding or extension of said mortgage and supplemental mortgage or of bonds heretofore issued thereunder shall have any interest in or lien upon said properties and franchises, the said defendant, City of Norwalk, Ohio,

its attorneys, officers, officials, agents, employes and representatives, *and all persons whomsoever to whom notice of this order shall come,* be, and they are severally and collectively hereby enjoined and restrained from in any manner interfering with or interrupting the full exercise of any and all of said franchise rights of the Ohio Electric Power Company as hereinbefore found and the continued operation of the existing plant and electrical distribution system of the Ohio Electric Power Company in the streets, alleys or other public places of the City of Norwalk, Ohio, and from taking any steps, or doing any act to dismantle, wreck or remove any part of said existing system from the streets, alleys and public places of said city, *and from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, decided May* 21, 1928, *which judgment was affirmed by the Supreme Court of Ohio, on June* 12, 1929, *and from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.*

Nothing in this decree shall be interpreted as a finding or decision of the court upon the question of the right of the Ohio Electric Power Company to extend its lines as they exist at the date hereof, the court not finding it necessary to decide that question at this time. The question is therefore reserved and not decided.

It is further considered and ordered that the plaintiff, The Chase National Bank of the City of New York, have and recover of and from the defendant, City of Norwalk, Ohio, its costs herein.

Jurisdiction of this cause is retained by this court for the purpose of taking all action necessary to make this decree fully effective and for the purpose of passing upon the questions reserved and not hereby decided, and either party may apply for further relief at the foot of this decree should occasion arise therefor.

To all of the foregoing the defendant hereby excepts." (R. 241, 242.) (Italics ours.)

(c) Circuit Court of Appeals of the Sixth Circuit reversed the District Court upon the ground that state court decree was the sole ground for the relief sought and that the record showed no circumstances justifying equitable interference with said decree. (R. 571-576.)

ISSUES

The issues appear to be:

(1) Did the Circuit Court of Appeals err in holding that the record showed no circumstances justifying equitable interference with the state court *quo warranto* proceedings?

(2) Has petitioner any continuing right to have its mortgagor, Ohio Electric Power Company, occupy the streets of the respondent?

Respondent contends that both questions should be answered in the negative. The second issue is not reached unless the first issue is disposed of against the respondent.

ARGUMENT

Sections I and II of petitioner's brief deal with the first issue and will be considered under Section I of this argument. Section II seems to us to be little more than a restatement of Section I.

Section IV of petitioner's brief deals with the second issue. While Section III purports to deal with the first issue, it seems to us to bear only upon the second issue. Therefore, Sections III and IV will be considered under Section II of this Argument.

I

CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE RECORD SHOWED NO CIRCUMSTANCES JUSTIFYING EQUITABLE INTERFERENCE WITH THE STATE COURT QUO WARRANTO PROCEEDINGS

A. The District Court decree violates Judicial Code Section 265 (Title 28 U. S. C. A. Section 379.)

1. The Relief Granted by the District Court Does Not Fall Within the Exceptions to the Prohibition Against Interference With State Court Proceedings by Federal Courts

Judicial Code Section 265 provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The permanent injunction entered by the District Court (R. 240-242) enjoins "all persons whomsoever to whom notice of this order shall come," from taking any steps or action of any kind whatever to cause the enforcement or carrying out of the judgment of ouster

entered by the Court of Appeals of Huron County, Ohio, in *State of Ohio ex rel. Martin vs. Ohio Electric Power Company,* by any of the officers of any of the courts in the State of Ohio. The injunction so granted is in direct violation of the provisions of Section 265 Judicial Code, in so far as it enjoins the Court of Appeals of Huron County, Ohio, itself, from taking any action whatsoever in the *quo warranto* case. The injunction in this regard does not fall within the class of cases where an injunction against enforcement of a judgment by a party to a suit in the state court is allowed, since, as we will point out, the parties to the suit in the state court are not before this court.

In continuing to operate in the streets, alleys, and public places of the City of Norwalk, the Ohio Electric Power Company is now in contempt of the Court of Appeals of Huron County, Ohio; and that court, but for the injunction granted by the District Court in the present case, can properly, of its own motion, cite the Ohio Electric Power Company and its officers for contempt. An injunction against such action by the Court of Appeals of Huron County certainly constitutes a stay of proceedings in a state court and is beyond the power of the District Court. Neither the Court of Appeals of Huron County nor the county prosecutor of Huron County nor the State of Ohio is a party to the present litigation.

In *Wells Fargo & Co. vs. Taylor,* 254 U. S. 175, the different types of cases in which federal courts may enjoin state court proceedings are in substance classified as follows: (1) the enforcement of local statutes which are repugnant to the Constitution of the United States, or (2) proceedings defeating or impairing the jurisdic-

tion of the federal courts, or (3) granting a party relief from a judgment under circumstances where its enforcement would be contrary to recognized principles of equity and standards of good conscience.

The present case does not fall within any of these three exceptions to the broad prohibition of the statute.

As the Circuit Court of Appeals pointed out, there has been no claim made that the judgment of the state court is void or that it was based upon fraud or mistake of fact.

It is not claimed that Ohio Electric Power Company did not have a fair trial in the state courts or that it did not have ample opportunity of fully presenting its case or that there was any suppression of evidence or that there was any inequitable or unconscionable conduct on the part of the respondent in the state court proceedings. The sole claim of the petitioner is that it has presented its claim that the twenty-year limitation was not a binding covenant upon a different theory than the same claim was presented by Ohio Electric Power Company in the *quo warranto* proceedings in the state courts. (See page 43 of petitioner's brief.)

In all of the cases cited by petitioner wherein a federal court enjoined the prevailing party in a state court from enforcing a judgment obtained in the state court, the judgment was void or voidable on some well recognized equitable ground. In the case at bar, the most that can be claimed is that the mortgagor's trustee has not been heard upon the merits of its mortgagor's claim that it (the mortgagor) has a perpetual franchise to occupy the streets, alleys and public places of the City of Norwalk.

The statement, at page 23 of petitioner's brief, that the "proceedings in the *quo warranto* action in the state court had long since terminated," is not correct, for it is apparent from the Record that the mandate of ouster granted by the State Court of Appeals had not been executed. So long as the writ of ouster remained unexecuted, the proceedings were still pending in the State Court of Appeals. The further statement, on page 23 of petitioner's brief, that inasmuch as petitioner was not a party to the *quo warranto* proceedings, the enforcement by the city of the judgment in *quo warranto* "would be just as unconscionable," as "if petitioner had been a party to the *quo warranto* proceeding and a judgment had been obtained against it by fraud, accident or mistake therein" is not warranted.

See *Bristow Battery Co. vs. Board of Commissioners,* 37 Fed. (2d) 504, *certiorari* denied 282 U. S. 843.

This case will be referred to at length in a subsequent part of this brief. (*Infra,* pp. 16 to 18.)

2. The Decree of the District Court Is a Direct Interference With the Proceedings of the State Court

Petitioner ignores the distinction between the interference with the enforcement of money judgments and interference with the enforcement of a valid order of ouster issued in a *quo warranto* action.

In *State ex rel. Martin vs. Ohio Electric Power Co., supra,* the Court of Appeals of Huron County, Ohio, issued an order of ouster against the defendant. This order was issued under Section 12317 of the General Code of Ohio, which reads as follows:

> "Sec. 12317. Judgment Where Office, Franchise, etc., Found to Have Been Usurped. When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs."

It is an order by the court to the defendant and its violation, as hereinbefore pointed out, is punishable by contempt proceedings.

See: *State vs. Cahill,* 131 Iowa 286, 108 N. W. 453; *People vs. Mortenson,* 224 Ill. App. 221 (1922).

In all the cases cited by petitioner, wherein a federal court enjoined the prevailing party in the state court from enforcing a judgment secured therein, the judgments were for money only. *Simon vs. Southern Ry. Co.,* 236 U. S. 115, is typical of cases relied upon by petitioner. In all these cases, the plaintiff in the state court merely changed his claim from an unadjudicated claim to an adjudicated claim; and in order to secure payment the judgment creditor was required either to cause a levy of execution to be made or to commence new proceedings in another court. As this court said, in the *Simon* case, when the plaintiff in the state court endeavors to use the judgment, which he has obtained, a new state of facts not within the language of the statute may arise which may warrant the federal court in an appropriate case to enjoin the enforcement of the judgment.

In the case of a judgment in *quo warranto,* the situation is materially different. The court orders the defendant to cease usurping the franchise and may enforce its order *sua sponte.* By an action in *quo warranto* the executive branch of the state government transfers to

the judicial branch the duty of vindicating the state and protecting its citizens against a usurper. No further action by the officer of the executive branch of the government bringing the suit is required to make the judgment effective. To prevent the enforcement of the order of ouster, the injunction of the federal court must operate upon the state court and its officers. A direct interference with proceedings in the state court is, therefore, involved.

Cf:

Evans vs. Gorman, 115 F. 399;
Harrison et al. vs. Triplex Gold Mines, Ltd., et al., 33 F. (2d) 667, 672;
Russell vs. Detrick, 23 F. (2d) 175;
Western Union Telegraph Co. vs. L. & N. R. Co., 218 F. 628.

While the District Court had jurisdiction of the parties and subject-matter of the litigation, it was clearly erroneous for it

> "to enjoin all persons to whom notice of the order of injunction should come from taking any steps or action of any kind to cause the enforcement of the judgment of ouster of the state court." (Opinion of Judge Moorman, R. 573.).

In *Bristow Battery Co. vs. Board of Commissioners, supra,* decided by the Circuit Court of Appeals, Tenth Circuit, it appears from the statement of Circuit Judge Lewis that the City of Drumright, in Creek County, Oklahoma, had issued $171,000.00 of funding bonds for the purpose of funding its outstanding indebtedness. In accordance with Oklahoma statutes, the city had obtained an order of a state court empowering it to fund its in-

debtedness. The bonds were approved and registered by the proper city and county officials and certified by the attorney general of the state, who is ex-officio bond commissioner, such certificate being attached to each bond. The bonds were regularly and legally issued. Four taxpayers of the city commenced an action in the Creek County District Court against the county treasurer in which they challenged the validity of the tax levy to pay the interest on said bonds and provide a sinking fund for the redemption thereof, on the ground that the bonds exceeded the constitutional debt limit of the city. The district court adjudged that the bonds had been legally and duly issued and constituted valid outstanding obligations of the city. The judgment of the district court was reversed by the Supreme Court of Oklahoma, which held that the bonds were void because in excess of the constitutional debt limit. Rogers County purchased in the open market for value $50,000 par value of these bonds in 1924, before the litigation in the state courts was commenced. Rogers County was not a party to either of the cases in the state courts, and it had no knowledge of the pendency of those cases. Prior to the time Rogers County had purchased the bonds, the Oklahoma Supreme Court had held in a number of decisions that the holders of municipal securities issued by the various municipalities in the state were necessary and proper parties to any action involving the legality of bonds so issued, and that the issuance of funding bonds issued concurrently with the cancellation of indebtedness of a municipality did not increase the indebtedness of such municipality, but merely changed the form thereof.

The Circuit Court of Appeals held, in substance, that a judgment entered by the State Supreme Court in a suit

by taxpayers, in which a holder of municipal bonds was not joined decreeing that the bonds were void because in excess of the constitutional debt limit of the city, although not binding on the holder of the bonds, did not give him a right to obtain a restraining order in a federal court to prevent the enforcement of the state court's judgment upon the ground that the provisions of Amendment 14 of the Federal Constitution were violated, and that even though the decision of the state court was erroneous the holder of the bonds was not deprived of his property without due process of law within the constitutional provision so as to give the federal court jurisdiction to interfere. Circuit Judge Cotteral dissented in that case, but, as stated, *certiorari* was denied by this court.

The Circuit Court of Appeals also held in the *Bristow Battery Company* case that the decision of a state court upon a question of law, however wrong or contrary to previous decisions, is not an infraction of the 14th Amendment to the Federal Constitution merely because it is wrong or because earlier decisions are reversed.

In *Russell vs. Detrick, supra,* it appeared that a suit had been instituted in a state court for the cancellation of certain securities of the value of $115,000.00 held by a state insurance commissioner as security for the payment of insurance policies issued to various parties. Detrick, the insurance commissioner, filed his bill in equity in the United States District Court and was granted an injunction by that court restraining the prosecution of the suit in the state court. Adverting to Section 265 of the Judicial Code, Circuit Judge Gilbert, at page 178, used the following language:

> "But the present case does not belong in the class of any of the recognized exceptions. It is an injunction against the plaintiffs in a state court, enjoining them against taking further steps in the prosecution of suits to cancel securities, and it is issued on behalf of plaintiffs in a federal court, not parties to the suits in the state court, to defeat cancellation of the securities and protect their own interest therein. We think the injunction comes clearly within the prohibition of Section 265."

The holding of this Court in *Essanay Film Mfg. Co. vs. Kane* (1922), 258 U. S. 358, cited at page 24 of petitioner's brief, is directly against their contention that the decision of the Circuit Court of Appeals was erroneous. This court there held, in substance, that a suit in a federal court to enjoin the further prosecution of an action *in personam*, still pending in a state court, on the ground that the attempted service of process upon defendant was lacking in due process of law, is forbidden by the provisions of the Judicial Code, § 265, that, except in bankruptcy proceedings, a federal court shall not "stay proceedings in any court of a state," and that the defendant's remedies are either a direct review in the Federal Supreme Court of the final judgment of the state court of last resort, or a collateral attack upon the judgment. Mr. Justice Pitney, who delivered the opinion of the court, expressed himself as follows: (p. 361):

> "At the same time, since 1793, the prohibition of the use of injunction from a federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld. *Hull vs. Burr*, 234 U. S. 712, 723, 58 L. Ed. 1557, 1563, 34 Sup. Ct. Rep. 892, and cases cited. In exceptional instances the letter has been departed from while the spirit of the prohibition has been observed; for example, in cases holding that,

> in order to maintain the jurisdiction of a federal court, properly invoked, and render its judgments and decrees effectual, proceedings in a state court which would defeat or impair such jurisdiction may be enjoined."

In every case cited by petitioner in its brief, to the effect that the enforcement of a void judgment, where the proper jurisdictional grounds exist, may be enjoined in a federal court, the judgment was either tainted with fraud or obtained under mistake of fact and the judgment challenged not by a third party, but by the judgment debtor himself and, as stated, the judgments in that class of cases were for money only.

Louisville Trust Co. vs. City of Cincinnati, 76 F. 296, is the only case we have found which discusses the power of a federal court to enjoin at the instance of a mortgagee, the enforcement of a judgment of ouster in *quo warranto* against a mortgagor utility issued by a state court, in view of Judicial Code Section 265. The *Simon* case and the other money judgment cases relied upon by petitioner are not inconsistent with the statement, in the *Louisville Trust Co.* case, of Mr. Justice Lurton, then a circuit judge, that such an injunction constitutes a violation of Section 265 of the Judicial Code, and that the court could not enjoin the enforcement of a writ of ouster in *quo warranto* or proceedings to secure enforcement of such writ. We recognize that such an injunction was not involved in that case. In the *Louisville Trust Co.* case, the injunctional order only restrained the defendant "from taking into its own hands the enforcement of the decree of the state court." The court also pointed out, in substance, that it would be improper to enjoin the defendant from applying for any writ which

the state court might lawfully issue or to prevent the execution of such writ "although its execution might be destructive of the interests of the complainant."

3. By Reason of the Nature of an Action in Quo Warranto the City Was Not and Could Not Be a Party to the Quo Warranto Proceedings. This Action Is Brought Against Respondent City to Evade the Provisions of the 11th Amendment Prohibiting Suit Against the State of Ohio.

The respondent was not a party to the *quo warranto* case and has no standing to secure enforcement of the order rendered therein. It is, therefore, clear that the injunction granted by the District Court in the case at bar can have no effect, unless it acts upon the Court of Appeals of Huron County itself and upon the State of Ohio, which was the moving party in the *quo warranto* litigation. This action constitutes an attempt to secure by indirection what can not be secured directly by reason of the prohibition against suits against the State of Ohio contained in the 11th Amendment to the Constitution of the United States and the prohibition against injunction with reference to state court proceedings contained in Section 265 of the Judicial Code.

Petitioner contends that the State of Ohio has no interest in the occupation of the streets of respondent by Ohio Electric Power Company and that respondent must be regarded as the real party in interest in the *quo warranto* litigation. This contention is inconsistent with the theory upon which petitioner bases its whole case; viz.: that all rights of public utilities who occupy the streets

of municipal corporations in Ohio come directly or indirectly from the state.

A consideration of the authorities in Ohio and elsewhere shows that the fact that *quo warranto* proceedings are brought by the state in its sovereign capacity is not a mere matter of form, but is of the essence of the proceeding. The *quo warranto* proceedings here under consideration were brought under Sections 12303 *et seq.* of the General Code of Ohio. Such an action is brought by the State of Ohio to protect the public (which includes the citizens of the City of Norwalk) from unauthorized, illegal usurpation; it is public and not personal in nature, regardless of the person who furnishes the information upon which the action is based.

State ex rel. vs. Maccabees, 109 O. S. 454 (1924);
State vs. Conservancy District, 100 O. S. 483;
People vs. Milk Producers Ass'n, 60 Cal. App. 439, 212 P. 957;
Anderson vs. Myers, 67 A. 1036 (N. J.);
State ex rel. Clare vs. Consolidated School District, 277 Mo. 458, 209 S. W. 938.

In *Hardin-Wyandot Co. vs. Upper Sandusky,* 93 O. S. 428 the Court of Appeals of Wyandot County, Ohio, held that a municipal corporation of Ohio could not bring an action to secure the removal of an electrical distribution system from its streets, and that the State of Ohio alone could bring such action.

See also:

Fredonia vs. Fredonia Natural Gas Light Co., 169 App. Div. 690, 155 N. Y. S. 212.

Likewise, such an action cannot be brought by a private individual.

13th Street Railroad Co. vs. Broad Street Railroad Co., 219 Pa. 10, 67 A. 901.

That the City of Norwalk could not be the real party in interest in the *quo warranto* suit is shown by the fact that under the laws of Ohio, full control of *quo warranto* proceedings, subject to the control of the court, is in the law enforcement officer of the state bringing the proceedings. The person who may furnish information to such public officer as a basis for such proceedings can not determine the course thereof. The bringing of such an action is discretionary with the public official.

Thompson vs. Watson, 48 O. S. 552;
State ex rel. vs. Craig, 21 O. C. C. 175;
See *Toledo Traction Co. vs. Smith*, 205 F. 643, 662.

The essence of the *quo warranto* action was an action by the State of Ohio against the Ohio Electric Power Company; and this court should look through the form of petitioner's cause of action to the substance thereof and recognize that the present action is one to enjoin the State of Ohio and the courts thereof from proceeding further in the *quo warranto* litigation. When the present case is so analyzed, it becomes apparent that the State of Ohio is a necessary party in order to secure the relief which the petitioner is really seeking; and the state not having given its consent to be sued, the present action should be dismissed as an attempt to secure, by indirection, jurisdiction over the state in violation of the

Eleventh Amendment to the Constitution of the United States.

Unless the District Court decree acts directly upon the Court of Appeals of Huron County, Ohio, and the State of Ohio, it can have no effect upon the *quo warranto* proceedings or the enforcement of ouster therein and is, therefore, nugatory. It should not be sustained unless some ground of jurisdiction other than the possible enforcement of the order of ouster is shown. We shall discuss such other possible grounds in the next section of this brief.

B. Petitioner Fails to Show That It Will Suffer Irreparable Injury by Forceful, Violent or Unlawful Action of Respondent City and, Therefore, Is Not Entitled to Equitable Relief.

Petitioner bases its claim that this case is a proper one for the exercise of equitable jurisdiction upon (a) the passage of the resolution of March 23, 1926, requesting Ohio Electric Power Company to remove its equipment from the streets of the City (Petitioner's Exhibit 42, R. 445); and the passage of the resolution of May 18, 1926, requesting the Prosecuting Attorney of Huron County, Ohio, to institute *quo warranto* proceedings against Ohio Electric Power Company (Petitioner's Exhibit 45, R. 449); (b) the action of the superintendent of light and power of the City of Norwalk in removing ten telephone company poles having contacts with wires of Ohio Electric Power Company from Main Street in the City of Norwalk (Amendment and Supplement to Bill of Complaint, § 2, R. 17); and (c) the statement of

one of the attorneys connected with the *quo warranto* proceeding that he had no authority to extend any more favors to Ohio Electric Power Company and that the removal of the lines and equipment of Ohio Electric Power Company would be carried out under the order of ouster entered by the Court of Appeals of Huron County in the *quo warranto* proceeding.

Respondent contends that none of these alleged grounds is a sufficient basis for equitable relief.

1. The Resolutions of the Municipal Council of March 23, 1926, and May 18, 1926, Do Not Furnish Any Basis for Equitable Relief.

The resolutions of the council of the City of Norwalk, of March 23, 1926, and May 18, 1926 (Petitioner's Exhibits 42 and 45, R. 445, 449), do not constitute laws impairing the obligation of contract. They show an intent upon the part of the city to follow the orderly processes of litigation to determine the rights of Ohio Electric Power Company. There was no threat contained in the resolutions to remove the property of the company by force. The city plainly followed the procedure which was approved by this court in *Des Moines vs. City Railway Co.*, 214 U. S. 179. Under the authority of that case, the Petitioner must show affirmatively the intention of Respondent to interfere with the electrical distribution of Ohio Electric Power Company other than by orderly court action.

Petitioner indulges in a forced and strained misconstruction of the provisions of the city's resolution of March 23, 1926, to establish a ground for equitable juris-

diction. Petitioner characterizes this resolution to be an "ordinance." As a matter of fact, it is not an ordinance, but provided merely for the service of notice of the city on Ohio Electric Power Company that it was without any franchise, license or authority to use the city streets and requiring it within thirty days from the date of the service of the notice to take its property from the streets, alleys and other public places of the city. This so-called "ordinance" has entirely spent its force, in that it was only a step taken in the orderly process of the city as a prerequisite to a request to the County Prosecutor that he commence an action in *quo warranto*. Nothing remains to be done by Respondent City under the provisions of either of the resolutions in question. There was nothing of a general or permanent nature in either of these resolutions which, in any way or by any process of reasoning, can be said to come within the inhibition of Section 1 of the 14th Amendment to the United States Constitution.

The resolution of March 23, 1926, when served on Ohio Electric Power Company, was simply a notice to quit, such as a landlord would serve upon a tenant holding over after the expiration of his term. Such a notice carries no implication that force is to be used to evict such tenant.

The argument of counsel in support of their unique theory, indicated at the last mentioned pages of their brief, is not supported by any of the decisions therein cited.

A comparison of the municipal ordinance, which was before this court in *Cincinnati vs. Cincinnati Traction Co.*, 245 U. S. 446, with the resolutions here under dis-

cussion shows that the case is not in point. The Cincinnati ordinance imposed drastic regulations on the utility pending judicial determination of its rights. The decree therein as modified by this Court only enjoins enforcement of these regulations pending such judicial determination. The resolutions of the Norwalk City Council contain no analogous regulations.

South Covington Ry. Co. vs. Newport, 259 U. S. 97, is not inconsistent with the contention the Respondent is here urging, for the reason that it involves only the sufficiency of the bill of complaint. We claim that Petitioner failed to prove the allegations contained therein to the effect that Respondent City had threatened to interfere with the electrical distribution system of Ohio Electric Power Company by forceful, violent, or unlawful acts.

St. Paul Gas & Light Company vs. St. Paul, 181 U. S. 142, and *Ross vs. Oregon,* 227 U. S. 150, cited at page 49 of Petitioner's brief, support Respondent's position rather than that of Petitioner.

The two resolutions in question indicate that Respondent City was disposed to follow orderly processes of litigation to determine the rights of Ohio Electric Power Company in the streets and public places of the city. The passage of these resolutions is inconsistent with the unwarranted statements of Petitioner, in its brief, that the disposition of the city was to "proceed by force."

These resolutions taken as preliminary steps to apply to a court of the country for an adjudication of the

rights of the parties are not laws impairing the obligation of a contract.

See *Des Moines vs. Des Moines City Railroad Co., supra;*
Defiance Water Co. vs. Defiance, 191 U. S. 184.

Bearing in mind that the grant of the county commissioners in the *Northern Ohio Traction & Light Company* case, 245 U. S. 174, was unlimited, which appears to have been the turning point of the case in this Court, the attention of the Court is respectfully called to the language of Mr. Justice Clarke, in a dissenting opinion concurred in by Mr. Justice Brandeis, at page 592, as follows:

> "The power to declare laws of states unconstitutional and to reverse the judgments of the supreme courts of states is so fateful and is so unprecedented in the history of governments other than ours that, as this court has repeatedly declared, it should be exercised only in cases which are clear, and it is impossible for me to think that this is such a case."

2. There Was No Action or Threatened Action by Respondent Justifying Equitable Relief

The record in this case clearly shows that during the pendency of the *quo warranto* case, the city solicitor and counsel for Ohio Electric Power Company agreed that the *status quo* should be maintained until final hearing thereof. (R. 102, 103.) This action was taken although the city was not a party to the *quo warranto* litigation. It shows a continuing intention upon the part of the city not to resort to anything other than orderly court action.

Petitioner lays great stress upon the removal of nine or ten poles belonging to The Local Telephone Company, to which there were contacts with wires of Ohio Electric Power Company, by employees of the city. This action took place while the *quo warranto* case was before the state courts. It clearly appears that these poles were removed under the authority of the ordinance of July 1, 1924, as poles which had been abandoned by The Local Telephone Company. (R. 148, 150; Petitioner's Exhibit 62, R. 466.) These poles were in unsafe condition and were a menace to the lives and safety of the citizens of Norwalk. (R. 149, 150.) There was no cessation of service of Ohio Electric Power Company as a result of the removal of these poles, and the city did not interfere with the replacement of new poles in their place. (R. 127.)

As soon as responsible city officials had learned of the removal of the poles, the employees carrying on the work were ordered to desist. (R. 146.) No other action by anybody connected with the city in any way interfering with the operations of Ohio Electric Power Company appears in the record.

Such unauthorized action of employees of the Department of Light and Water concerning the poles of the Telephone Company and not the poles of Ohio Electric Power Company, and carried on in the interests of public safety and not under any claim of right to oust Ohio Electric Power Company from the streets of the city, cannot be considered as evidence of intention upon the part of the city forcibly and unlawfully to oust Ohio Electric Power Company from its streets.

Any statements by Mr. Craig, who was one of the counsel connected with the *quo warranto* proceedings, with respect to his attitude towards the present litigation cannot be urged by petitioner as proof of an intention upon the part of the respondent to use force or unlawful means to oust the Ohio Electric Power Company from the streets, since it is clear that at the time any such statements were made, Mr. Craig had not been employed to represent respondent in this litigation. (R. 109, 115.) Mr. Craig's statements are, therefore, no more binding upon the city than those made by any other citizen thereof. In addition, the statements of Mr. Craig, testified to by petitioner's witnesses, do not imply any intention upon his part or that of the respondent to take action against Ohio Electric Power Company other than through orderly judicial proceedings. The attitude of Mr. Craig upon this subject was one of unusual solicitude, lest any violent action be taken by anybody against Ohio Electric Power Company. (R. 105, 146, 147.)

The situation which has really brought about the present litigation is that there is now pending in the Court of Appeals of Huron County, Ohio, in the case of *State ex rel. Martin, Prosecuting Attorney of Huron County, Ohio, vs. The Ohio Electric Power Company,* an order of ouster against Ohio Electric Power Company. It is this order of ouster which really worries the petitioner and its mortgagor, and the other alleged grounds for equitable jurisdiction are, we submit, merely window dressing. The order of ouster was entered in an action brought by the State of Ohio. The City of Norwalk was not and could not be a party to the action. The possibility of the enforcement of such an order of ouster manifestly cannot be the basis of equitable relief as against the Respondent City.

II

PETITIONER HAS NO CONTINUING RIGHT TO HAVE ITS MORTGAGOR, OHIO ELECTRIC POWER COMPANY, OCCUPY THE STREETS OF RESPONDENT

A. The Ordinance of October 7, 1890, was a valid contract limited in term to twenty years and is binding upon Petitioner's Mortgagor as the Successor of The Norwalk Incandescent Light Company.

The ordinance of the City of Norwalk of October 7, 1890 (Exhibit B attached to the Second Amendment and Supplement to the Bill of Complaint, R. 36), is in form a grant of easement or right of way to The Norwalk Incandescent Light Company, the partnership, and its successors and assigns, limited in term to twenty years from the date thereof. Respondent contends that it was in all respects a valid enactment and, having been accepted by The Norwalk Incandescent Light Company and its successors, constitutes, under the decisions of the Supreme Court of the United States and of the courts of Ohio, a valid and binding contract as to all of its provisions, including the term limitation. Respondent further contends that since the electrical distribution system of Ohio Electric Power Company was constructed and operated under the easement created by the ordinance which has now expired it is now operated without right and an injunction to protect such operation is improper.

1. The City Had the Power to Pass the Ordinance Under the Act of May 12, 1886

The city clearly had the power to pass the ordinance of October 7, 1890, under the provisions of the Act of May 12, 1886, 83 O. L. 143, which reads as follows:

"AN ACT

"To authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, *with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe.* (Italics ours.) Provided, that all wires erected and operated under the provisions of this act shall be covered with a waterproof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

"Section 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands,

lanes, squares and public places in such city, village or town.

"Section 3. This act shall take effect and be in force from and after its passage.

Passed May 12, 1886."

Petitioner contends that this act was repealed by implication by the Act of January 26, 1887, 84 O. L. 7, which is as follows:

"AN ACT

"To supplement sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that the following section shall constitute a section supplementary to sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio, with sectional numbering as follows:

"'Sec. 3471a. The provisions of this chapter, so far *as the same may be applicable* (Italics ours), shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.

"Section 2. This act shall take effect and be in force from and after its passage.

"Passed January 26, 1887."

It is obvious from a reading of the later act that there is no express repeal of the earlier act. The later act provided that the provisions of the General Incorporation Act of Ohio relating to magnetic telegraph companies should apply to electric light companies, so far as the

same should be "applicable." The earlier act was not enacted as part of the General Corporation Act.

It is a well established rule of statutory construction that a general statute will not be considered as repealing an earlier particular statute by inference, unless obviously inconsistent therewith.

Memphis vs. Postal Telegraph & Cable Co., 145 F. 602 (C. C. A. 6th, 1906).
Guthrie vs. Sparks, 131 F. 443 (C. C. A. 6th, 1904).
Fosdick vs. Perrysburg, 14 O. S. 472, 485 (1863).

There is no obvious inconsistency between the two acts. It is enough for present purposes to point out that the later act may be interpreted as relating only to corporations, while the earlier act continued in force insofar as it affected unincorporated companies.

On April 22, 1896, the Legislature of Ohio indicated that it regarded the Act of May 12, 1886, as still in effect when it amended Section 2 of the Act without amending or repealing Section 1 thereof (Act of April 22, 1896, 92 O. L. 290). The Act of May 12, 1886, was repealed October 22, 1902 (96 O. L. 20, 102), which is further evidence that the legislature still regarded it as unrepealed by the Act of January 21, 1887.

In *Hardin-Wyandot Lighting Co. vc. Upper Sandusky*, 93 O. S. 428, 439 (1916), Judge Johnson discusses the relation between the Act of May 12, 1886, and the Act of January 26, 1887, in the following language:

> "This act did not repeal the Act of May 12, 1886, *supra,* in express terms, but when the two acts are contrued together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' * * *"

Judge Johnson does not state that the later act repealed the earlier one and his statement cannot be so construed when we consider that the later act did not cover unincorporated companies. It is further to be noted that Judge Johnson's statement is clearly *obiter,* for the Supreme Court of Ohio affirmed the judgment of the Court of Appeals against the Hardin-Wyandot Lighting Company upon the ground that the company had violated the provisions of a *municipal franchise ordinance.* The ordinance was held to be a valid and binding contract as against the lighting company. Whether the ordinance was adopted under the Act of May 12, 1886, or under the Act of January 26, 1887, was of no importance to the decision of that case, as we shall have occasion to point out at greater length. (*Infra,* pp. 81 to 88.)

Respondent's position that the Act of January 26, 1887, did not repeal the Act of May 12, 1886, either expressly or by implication, is strengthened by the following language in the opinion of Judge Allen in *Ohio Public Service Co. vs. State of Ohio ex rel. Fritz,* 113 O. S. 325, 332:

> "The syllabus"—[of *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandnsky,* 93 O. S. 428] "did not state that the statute of 83 Ohio Laws 143, was repealed by implication, and in the judgment of the writer of this opinion such was not

the effect of the enactment of Section 9192, General Code, with its proviso that the provisions of the chapter should apply to electric light and power companies 'so far as applicable'."

(The foregoing statement of Judge Allen is also *obiter*.)

2. The City Had Power to Enact the Ordinance of October 7, 1890, Under Its General Powers Over Its Streets

Even in the absence of the Act of May 12, 1886, the City of Norwalk had full power to make the grant contained in the ordinance of October 7, 1890. Under the statutes in force at the time the franchise was granted to the partnership in 1890, the city had the general power to lay out, establish, open, widen, narrow, straighten, extend, keep in order and repair, and to light its streets, alleys, and public grounds, etc. (*Ohio R. S.* 1890, *Sec.* 1692.) It likewise had the power to appropriate, enter upon, and hold real estate within its corporate limits for the purpose of widening, narrowing, or straightening its streets, alleys, and public grounds, and for lighting for any public use. (*Ohio R. S.* 1890, *Sec.* 2232.) General power of control over the streets was given to the city council. (*Ohio R. S.* 1890, *Sec.* 2640.)

The city had the further power to regulate from time to time the price which any electric light company might charge for public or private electric light service and such electric light company could in no event charge more for such service than the price specified by the ordinance; and the city further had the power to regulate and fix the price which such company might charge for

rent of its meters. (*Ohio R. S.* 1890, *Sec.* 2478.) The city could also by contract or otherwise provide for the lighting of its streets. (*Ohio R. S.* 1890, *Secs.* 2491, 2492.)

(The statutes cited in the last two preceding paragraphs are quoted in Appendix A, *infra.*)

Under the law of Ohio, a municipal corporation has title in fee simple to its streets, alleys, and public places, which title is held in trust for the benefit of the public.

The case of *Kinsman Street Railroad Co. vs. Broadway, etc., R. R. Co. et al.*, 36 O. S. 239, supports respondent's position that the city had power to adopt the ordinance of October 7, 1890, under its general powers over its streets. The Supreme Court of Ohio held in that case that a municipal corporation can provide for the establishment of street railways under its general powers of regulation and control of its streets. At page 250, the court says:

> "The power to regulate and control the public streets of the city is lodged in the municipal authorities. The object in conferring this power, and its exercise by the city council, are, and should be, to conserve the public welfare and convenience. One of the modes of promoting this welfare and convenience is through the establishment of street railroads. * * *"

With equal conviction, it may be stated that the power to establish electric lighting systems is conferred upon cities and villages.

See also

Hattersley vs. Waterville, 26 O. C. C. 226.

Pike's Peak Power Co. vs. Colorado Springs, 105 F. 1 (C. C. A. 8th, 1900).

In *Columbus Telephone Co. vs. Columbus,* 88 O. S. 466 (1913), the Supreme Court of Ohio held that under its general powers over streets, a municipal corporation could enact a franchise ordinance granting a telephone company the right to use its streets upon the payment of a percentage of the company's gross receipts. The court further held that by acceptance of the franchise grant and operation thereunder, the telephone company became estopped to assert the invalidity of the ordinance.

In *Columbus vs. Public Utilities Commission,* 103 O. S. 79, Judge Wanamaker, in his concurring opinion at page 130, goes even further when he says that by incorporation a municipal corporation receives the power to enter into contracts of the nature of the ordinance of October 7, 1890. He bases his opinion on *Cass vs. Dillon,* 2 O. S. 607.

Petitioner's counsel contend that *Brush Electric Light Co. vs. Jones Bros. Co.,* 5 O. C. C. 340, is authority that in the absence of the express grant of power contained in the Act of May 12, 1886, a municipality could not grant the right to use its streets, alleys, and public places for the erection of electric lighting equipment. We submit that the question before the court in that case was the validity of certain orders of the municipality requiring the joint use of poles. The court expressly upheld such orders, and any discussion in the case of the powers of municipalities prior to May 12, 1886, is *obiter.*

3. The Supreme Court of the United States Has Uniformly Upheld the Validity of Franchise Ordinances Such as the Ordinance of October 7, 1890.

Petitioner contends that the decision in this case is to be determined by the interpretations of the law of Ohio as found in the opinions of the Supreme Court of the United States insofar as there is any conflict between the decisions of that court and the decisions of the state courts in Ohio. We do not admit that any such conflict exists as to the questions involved in the present case. The Supreme Court of the United States has uniformly upheld the validity of franchise ordinances passed by Ohio municipal corporations and has enforced the same as binding contracts upon all parties thereto.

In *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574 (1918), the Supreme Court held that a resolution adopted by the county commissioners granting right of way for an electric railway *to an individual*, with no provisions limiting the term thereof, constituted a valid and binding contract as between the county and the successor of the individual, perpetual as to time.

In *Ohio Public Service Co. vs. State*, 274 U. S. 12, the State of Ohio, on the relation of the prosecuting attorney of Wayne County, Ohio, brought an action in *quo warranto* to oust The Ohio Public Service Company from the streets of the Village of Orrville. The defendant claimed that it had a perpetual franchise to operate in the streets of the village by virtue of a franchise ordinance adopted by the village in 1892, granting to a partnership a right of way in the streets, alleys, and public places of the village. The company also claimed that it

had a state granted franchise resulting from the incorporation of its predecessor in title between the years 1887 and 1896. *The prosecuting attorney claimed, as the petitioner claims in the present case, that a municipal corporation was in* 1892 *without power to grant a franchise to use its streets.* The Court of Appeals of Wayne County held that the franchise ordinance of 1892 constituted a valid and binding contract, and that by incorporation the predecessor in title of the defendant received at most the capacity to secure a right to occupy the streets of the defendant city. It further held that as the franchise ordinance contained no limitation of time, it was cancelable by either party at will, and granted an order of ouster. The decision was affirmed by the Supreme Court of Ohio in 113 O. S. 325.

The Supreme Court of the United States (Mr. Justice Holmes and Mr. Justice Brandeis dissenting) reversed the judgment of the state courts upon the ground that *the franchise ordinance of* 1892 was a valid and binding contract perpetual in term and that to hold, as was held by the Supreme Court of Ohio, that the Act of April 21, 1896, terminated the franchise or made it non-assignable, constituted impairment of the obligation of a contract. It is to be noted that although The Ohio Public Service Company strongly argued its alleged state franchise in the Supreme Court of the United States, the Supreme Court placed its decision upon the validity of the municipal franchise. This case is, therefore, authority for the proposition that a municipal ordinance of the nature of the ordinance of October 7, 1890, constitutes a binding contract.

Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky, 251 U. S. 173 (1919), upon which petitioner relies in this case, recognizes the validity of a municipal franchise ordinance of the nature of the ordinance of October 7, 1890. The reasoning of Mr. Justice Clarke, who rendered the opinion, shows clearly that he assumes the validity of such an ordinance.

See also:

Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517, 534;

Columbus Ry. & Power Co. vs. Columbus, 249 U. S. 399.

4. The Supreme Court of Ohio and the Court of Appeals of Huron County, Ohio, Have Expressly Upheld the Validity of the Ordinance of October 7, 1890

In the *quo warranto* case involving the same situation which is now before this court, *State of Ohio ex rel. Martin vs. Ohio Electric Power Company,* 35 O. App. 481, 172 N. E. 615, affirmed 121 O. S. 235, 167 N. E. 877, both the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio held the ordinance of October 7, 1890, to be a valid enactment and to constitute a contract binding upon the parties thereto, and upon the Ohio Electric Power Company as successor of the grantee under the ordinance. The opinions in both of these cases are set forth in full in Appendix B.

The Court of Appeals said at page 489:

> "It seems to us that neither a partnership nor an individual was contemplated by or designated in these statutory provisions." (Ohio R. S. 1890, Sections 3454 to 3471a.) "Their context seems

clearly to indicate that the privileges thereby granted by the state applied only to incorporated companies. If this conclusion is correct, then not only the right to use, but the mode of use, could have been acquired by the partnership not otherwise than with the consent of the municipality expressed in an ordinance conferring those privileges. This the City of Norwalk did by the ordinance of October 7, 1890, limiting therein the right to use and the mode of use to twenty years from that date. The partnership, therefore, and its successive assignees, acquired the right to occupy the streets, alleys, etc., of Norwalk from the city and not from the state. Surely an electric light and power company upon which the state has conferred certain rights, conditional upon compliance with the legislative enactments creating them, may not as an assignee of a partnership or an individual acquire the rights so granted in derogation of the authority conferring them."

The Supreme Court said at page 239:

"Under the law as it stood in 1890, when such 20-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself."

It is claimed that *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky,* 93 O. S. 428, is in conflict with respondent's position that the ordinance of October 7, 1890, constituted a valid and binding contract. In that case the Village of Upper Sandusky brought an action to enjoin the defendant lighting coupany from operating in the streets of the village. The Common Pleas Court of Wyandot County dismissed the petition. The Court of Appeals of Wyandot County upheld the decision of the Common Pleas Court, insofar as the existing lines of

the defendant company were concerned, upon the ground that injunction was not the proper remedy, but enjoined any extensions of the lines of the defendant company. This judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio. It is to be noted that the village did not bring error proceedings from the decision of the Court of Appeals as to existing lines of the lighting company. The decision of the Court of Appeals is affirmed by the Supreme Court solely upon the ground that the defendant company had violated the provisions of a *municipal franchise ordinance of* 1889. The case therefore directly supports the proposition that a franchise ordinance adopted between the years 1887 and 1896 constitutes a valid enactment and a contract, binding upon the public utility operating thereunder. On this subject the court says, at page 442:

> "However, as pointed out, the ordinance in question here was passed in 1889, while the act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it. We are compelled to assume that the allegations of the petition were sustained by the evidence, and that the defendant, without the knowledge or consent of the plaintiff, removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatever for the purposes of public

lighting. *It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise which was accepted by the predecessor of the plaintiff in error.*" (Italics ours.)

The present system for the distribution of electricity operated by the Ohio Electric Power Company was constructed and operated by the Norwalk Incandescent Light Company, the partnership, under the authority of the ordinance of October 7, 1890. (R. 53.) It is clear that the rights under the ordinance were assigned to the successors of the partnership. (R. 54.) Petitioner claims that although the ordinance was invalid as a grant of franchise or right of way, it did inure to the benefit of the petitioner's mortgagor as "an agreement as to the mode of use" of the streets of the respondent city. Respondent insists that the ordinance was either what it purported to be, a franchise grant limited in term to twenty years, or was a nullity. Under elementary rules of statutory and contractual construction the doctrine of entirety of contract applies in a situation such as that now before this court.

In *Columbus vs. Public Utilities Commission*, 103 O. S. 79, Marshall, C. J., says at page 104:

> "Surely the principle of entirety of contract must apply to this case, and it is elementary that one party to a contract, whether entire or divisible, may not invoke the aid of a court for relief from certain conditions and obligations of a contract and at the same time claim the benefits and advantages of other features of the contract. * * *"

In claiming the benefit of the ordinance for certain purposes, the petitioner becomes bound by the limitation of term contained therein.

The ordinance, being a valid and binding contract, became binding upon the individuals and corporations which accepted assignments thereof and which accepted conveyances of the electrical distribution system erected thereunder and operated the same. All such parties, including the petitioner, thereby became bound by the twenty-year limitation contained therein, and on and after the expiration of such ordinance were without right to operate such system upon the streets, alleys and public places of the City of Norwalk.

It follows that, since the petitioner's mortgagor, Ohio Electric Power Company, was operating an electrical distribution system in the City of Norwalk at the time of its mortgage to the petitioner, which had been erected and operated under an easement which had expired at the time of the creation of said mortgage, the petitioner has no right to the continued operation of such system and should have been denied the relief granted to it by the District Court.

B. The Petitioner Is Estopped to Claim a Present Continuing Right to Have Its Mortgagor, Ohio Electric Power Company, Occupy the Streets, Alleys, and Public Places of the City of Norwalk

The ordinance of October 7, 1890, was accepted by The Norwalk Incandescent Light Company, the partnership, at the time of its adoption (R. 63). The electrical distribution system now operated by the Ohio Electric

Power Company in the streets of the respondent city was erected by The Norwalk Incandescent Light Company under the grant of right of way given by the ordinance of October 7, 1890. (R. 53.) It is admitted by petitioner that whatever rights were secured by the partnership under the ordinance of October 7, 1890, were assigned along with the electrical distribution system to the various successors of the partnership. In fact petitioner itself claims the benefits of the ordinance. (Bill of Complaint, Section 13, R. 10, 11.)

We submit that under these facts petitioner is estopped to deny that the ordinance of October 7, 1890, constitutes a valid and binding contract and that the petitioner is bound by the twenty-year limitation contained therin. The power of the city to enact such an ordinance thereby becomes wholly immaterial.

Exactly the same situation was before the Supreme Court of the United States in the case of *Bankers Trust Co. vs. City of Raton,* 258 U. S. 328 (1922). The plaintiff in that action as trustee under a deed of trust conveying all the property and franchises of the Raton Water Works Company to it to secure an issue of bonds, sought to restrain the defendant City of Raton from revoking the company's rights to use the streets of the city and from ousting it from such streets. (The same relief is sought in the instant case.) The Trust Company claimed that its mortgagor, by incorporation under the laws of the territory of New Mexico passed February 24, 1887, secured a franchise unlimited in duration to lay its mains and pipes in and along the public streets and alleys of the City of Raton. (The same contention is made by the petitioner in this case in connection with

the incorporation of The Incandescent Light & Power Company and The Northern Electric Company in 1891 and 1895, respectively.)

The mortgagor company in the *Knox* case entered into a contract evidenced by an ordinance under which the company was granted the right to lay its mains and pipes in the streets of the city. The ordinance was limited in term to twenty-five years. Upon the adoption of the ordinance, the company constructed a water works system in accordance with the terms thereof. The Bankers Trust Company claimed that the twenty-five year ordinance was invalid, or immaterial in view of the alleged grant of a franchise from the state. (The same contention in respect of the ordinance of October 7, 1890, is made by the petitioner in this case.)

The defendant city contended that the acceptance of the franchise ordinance and the construction of a water works system thereunder estopped the plaintiff trustee from claiming that its mortgagor was not bound by the twenty-five year limitation contained in the ordinance and from claiming that it had a right to continue the operation of the water works system after the termination thereof.

In affirming a decree dismissing the bill of complaint, this Court adopted the contention of the defendant city. Mr. Justice McKenna says, at page 335:

> "We are not called upon to review in detail the contentions and consider their various elements. We concur in the view of the city that the Water Works Company *is estopped by its contract with the city, evidenced by Ordinance No.* 10 (which we may remark was ratified by a vote of the citizens of the city), and we construe it as the city construes it. *From what act the power to enact*

it was derived we need not pronounce. We may say, however, that the Supreme Court of the state in *Raton Waterworks Co. vs. City of Raton,* 22 N. Mex. 464, said the franchise of the company was granted by an ordinance of the city, and certainly the bill in this case shows that its term was fixed at twenty-five years from July 25, 1891. The term, therefore, had expired when the amended bill was filed. The term of the rights having expired, necessarily the rights granted expired, and the city cannot be enjoined from requiring the removal of the company's system from the streets of the city. * * *" (Italics ours.)

Bankers Trust Co. vs. Raton is in all material respects analogous to the situation before the court in the present case, and, upon the authority of that case, the bill in the instant case should be dismissed.

The District Court in its memorandum opinion (R. 233) seeks to distinguish *Bankers Trust Co. vs. Raton* upon the ground that "none of the 'conventional elements' of equitable estoppel are present here. It cannot fairly be said that there was any reliance by the city or any misleading by any of the companies." We submit that the District Court has erred in assuming that there was no reliance by the City of Norwalk upon the ordinance of October 7, 1890. The city allowed The Norwalk Incandescent Light Company to erect a system for the distribution of electricity, using practically all its streets. (R. 53, 63.) It was a similar reliance by the City of Raton that supported the estoppel which the Supreme Court of the United States found to be applicable in that case.

The city further allowed the successors of The Norwalk Incandescent Light Company to continue to operate

the electrical distribution system under the ordinance. The ordinance was printed as Section 62 of General Ordinances of the City of Norwalk. (Petitioner's Exhibit 35, R. 434).

No other claim of right to occupy the streets of the City of Norwalk was ever made by the petitioner, by its mortgagor, or by its predecessors, until the filing of the answer in the *quo warranto* case, *State ex rel. Martin vs. Ohio Electric Power Company.*

The fact that the public lighting contract of April 13, 1905, extended approximately five years beyond the expiration date of the ordinance of October 7, 1890, is not inconsistent with respondent's position. The public lighting contract (Respondent's Exhibit H, R. 541) expressly covers this situation in Section 14 which provides in part as follows:

> "* * * *and provided further that nothing herein contained shall permit said use or occupation of said streets, alleys and other public places after the expiration of this contract, to-wit: August* 31, 1915, * * *
>
> *"The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires, and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred."* (Italics ours.)

The course of negotiations between the city officials and the officers of The Cleveland and Southwestern Trac-

tion Company, which was operating the electrical distribution system at the time of the expiration of the public lighting contract, discloses the understanding of both parties that all rights of the public utility expired upon the expiration of the public lighting contract. (R. 135, 136, 137, 202.)

Likewise the terms of the ordinance of July 1, 1924, (Petitioner's Exhibit 38, R. 438) and the action of the city officials thereunder are not inconsistent with the estoppel which the city is here claiming. That ordinance was a general police regulation dealing with all companies maintaining wires carrying electricity, including interurban railway wires, signal wires, telephone wires, telegraph wires, and lighting and power wires. Whether the Ohio Electric Power Company and its predecessor, The Cleveland and Southwestern Traction Company, were using the streets of the city at the sufferance of the city or whether they were using them under a franchise grant, they would be subject to the terms of this ordinance and were properly required to comply therewith. The fact that the Ohio Electric Power Company was using the streets of the city without right did not exempt it from complying with the terms of the ordinance which was enacted in the interest of public safety.

Other cases holding that a public utility is estopped from asserting that an executed franchise agreement is *ultra vires* the city are:

Mercantile Trust & Deposit Co. vs. Collins Park & Belt Railroad Co., 101 F. 347 (C. C. N. D. Ga., 1900);

Columbus vs. Public Utilities Commission, 103 O. S. 79 (1921);

Mayor of Jersey City vs. North Jersey St. Ry. Co., 72 N. J. Law 383, 61 A. 95, 97 (1905);

City of Emporia vs. Emporia Telephone Co., 88 Kan. 443, 129 P. 187 (1913);

Belfast vs. Belfast Water Co., 115 Me. 234, 98 A. 738, L. R. A. 1917 B 908;

Mitchell vs. Telephone Co., 25 S. Dakota 409 (1910). (See also 246 U. S. 396 (1917) for another phase of same litigation);

Potter vs. Calumet Electric St. Ry. Co., 158 F. 521, 529 (C. C. N. D. Ill., 1908).

Farmer vs. Telephone Co., 72 O. S. 526, is clearly distinguishable from the present situation for the reason that the ordinance provision which the plaintiff in that case sought to enforce was expressely prohibited by statute. The ordinance granted to the predecessor of the telephone company the right to use the streets of the City of Salem, and under its terms it was provided that the subscribers in the city receive free telephone service over the lines of the grantee with all other exchanges and subscribers of the grantee within the County of Columbiana, and further that the grantee permit the city to place its police and fire alarm wires and boxes upon the grantee's poles without charge therefor. These provisions were held to be in direct violation of *R. S., Sec.* 3461, which expressly stipulated that "nothing in this section contained shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what

may be necessary to restore the pavement to its former state of usefulness." The court holds that an estoppel cannot operate to nullify an express statutory prohibition. No such question arises in connection with the estoppel which the respondent is asserting in this case.

See *St. Louis vs. Davidson,* 102 Mo. 149, 153, 14 S. W. 825 (1890).

We submit that under the authorities cited above, the petitioner is estopped to claim that it has a present right to have its mortgagor, Ohio Electric Power Company, occupy the streets, alleys, and public places of the City of Norwalk.

C. The Petitioner Has No Right To Have Its Mortgagor, Ohio Electric Power Company, Occupy the Streets, Alleys and Public Places of the City of Norwalk by Virtue of the Fact of Incorporation of The Incandescent Light & Power Company and The Northern Electric Company in 1891 and 1895, Respectively.

Outline of Respondent's Contentions

Petitioner's claim that its mortgagor, Ohio Electric Power Company, now holds a perpetual easement in the streets of respondent is based upon its theory that its mortgagor's predecessors in title, The Incandescent Light & Power Company and The Northern Electric Company, secured perpetual easements by incorporation in 1891 and 1895 respectively, under the provisions of the magnetic telegraph company chapter of the Ohio General Corporation Act and particularly under Revised Statutes of 1890, Sections 3454 and 3461.

Respondent contends in this regard:

1. That The Incandescent Light & Power Company and The Northern Electric Company, by incorporation, secured at most merely the capacity to secure an easement in the streets of the respondent city and not a complete and vested property right to operate therein.

If respondent is correct in this contention, it follows:

2. The petitioner's predecessors in title did not comply with the provisions of Revised Statutes Sec. 3461, requiring an agreement with the respondent or an order of the Probate Court, and petitioner can, therefore, claim no rights under such Section.

3. If the ordinance of October 7, 1890, be considered as constituting an agreement with respect to the mode of use of respondent's streets under Revised Statutes Sec. 3461, all rights secured thereunder expired 20 years from the date of such ordinance.

4. The capacity of petitioner's predecessors in title to secure any easement under Revised Statutes Sec. 3461 was terminated by the Act of April 21, 1896 (92 O. L. 204).

5. Any capacity secured by petitioner's predecessors in title upon incorporation to acquire an easement by complying with the provisions of Revised Statutes Sec. 3461 was not assignable and is not now held by Ohio Electric Power Company.

6. The ordinance of July 1, 1924, has no bearing upon this case. It does not constitute a grant of easement or an agreement of any sort.

7. All rights of petitioner's predecessors in title became terminated on the expiration of the public lighting agreement of April 13, 1905.

We call attention to the use by the petitioner of the term "perpetual franchise" throughout its argument upon this question. We submit that the use of this term begs the entire question, for it is obvious that the inquiry must be what franchise did The Incandescent Light & Power Company and The Northern Electric Company secure by incorporation. The petitioner must show an easement to prevail in this case. The right of eminent domain secured upon incorporation may be described as a franchise, and yet it is not a vested property right. We shall have occasion to point out in our consideration of the Ohio cases relied on by the petitioner that in every case when such terms as "right to use the streets," etc., is used, the context clearly shows that it is the right of eminent domain that is referred to and not an easement in the streets.

For the convenience of the court a collection of statutes of Ohio relating to the creation of public utility easements in the streets of municipalities is to be found in Appendix A, *infra*.

1. The Incandescent Light & Power Company and The Northern Electric Company by Incorporation Secured at Most, as Part of Their Corporate Franchises, the Capacity to Secure an Easement in the Streets of the Respondent City, and Not a Complete and Vested Property Right to Operate Therein.

The question of the nature of the rights secured by The Incandescent Light & Power Company and The Northern Electric Company upon incorporation is one of statutory interpretation. In determining this ques-

tion, we submit that this court should be guided by the rule laid down in *Blair vs. Chicago,* 201 U. S. 400 (1906), which involved essentially the same question we are here discussing. In considering an act of the legislature of Illinois which the plaintiff in that case claimed granted to it an exclusive right to maintain its tracks in certain streets of the City of Chicago, Mr. Justice Day says at page 463:

> "We may premise, before taking up this act for more detailed consideration, that it is a firmly established rule, which we shall have occasion to refer to later on in this discussion, but which must be borne in mind as we enter upon the consideration of this act, that one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. * * *"

See also a more detailed discussion of this same subject in the same case commencing at the bottom of page 471.

Wabash R. R. Co. vs. Defiance, 167 U. S. 88;
Cleveland Electric Ry. Co. vs. Cleveland, 204 U. S. 116;
R. R. Co. vs. Defiance, 52 O. S. 262, 307.

We suggest that the approach to the interpretation of the statutes of Ohio here involved should be similar to that adopted by Judge Lurton in *Louisville Trust Co. vs. Cincinnati,* 76 F. 296 (C. C. A. 6th, 1896). In that case the court was called upon to consider a claim that Section 12 of the Ohio General Incorporation Act of May

1, 1852 (R. S. Sec. 3283) should be construed to the same effect as petitioner contends R. S. Sec. 3461 should be construed. Judge Lurton says at page 308:

> "The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements upon terms and conditions to be agreed upon between such companies and the local government. When, therefore, we come to construe an Ohio statute providing for the organization of either ordinary railway or street car companies, we may well do so with the expectation that this well-settled policy has not been departed from and that the state has stopped with the grant of the usual and necessary corporate franchises proper, by which it has been endowed with power to operate its road for tolls, when it shall have acquired from the local authority the equally essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business."

(a) The Magnetic Telegraph Company Chapter

The Act of January 26, 1887, 84 O. L. 7, Ohio R. S. 3471a, makes the provisions of *Chapter* 4 (*Magnetic Telegraph Companies*) *of Title II* (*Corporations*) *of the Revised Statutes*, in so far as they may be applicable, apply to electric light companies. It therefore becomes necessary to give *in extenso* the provisions of this chapter and to enter into some discussion of its history.

"TITLE II. CORPORATIONS

* * * * * *

CHAPTER 4

MAGNETIC TELEGRAPH COMPANIES

"Section

3454. Powers of companies.
3455. Further powers.
3456. May enter upon and appropriate lands.
3457. Limitation upon such authority.
3458. When the land to be appropriated is held by a corporation.
3459. When such land is held by a railroad company.
3460. When the lands lie in more than one county.
3461. How right to use public grounds acquired.
3462. Must receive and transmit dispatches.
3463. When to forward messages by other lines.
3464. Agent must indorse dispatch, when.
3465. Penalties for not transmitting or delivering message.
3466. Penalties against persons connected with companies.
3467. Penalties for knowingly transmitting dispatches forged, etc.
3468. When and how telegraph structures may be removed.
3469. How and when repair of structures enforced.
3470. Companies may consolidate.
3471. Chapter applies to telephone companies.
3471a. Laws applicable to electric light companies.

POWERS OF COMPANIES

"Sec. 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the neces-

sary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (50 v. 274, Sec. 47.)

Powers of Telegraph Companies

"Sec. 3455. Any such company may construct, own, use, and maintain any line or lines of magnetic telegraph, *whether described in its original articles of incorporation or not,* and whether such line or lines are wholly within or partly beyond the limits of this state, and may join with any other company or association in conducting, leasing, owning, using, or maintaining such line or lines, upon such terms as may be agreed upon between the directors or managers of the respective companies; and such companies may own and hold any interest in any such line or lines, or may become lessees of such line or lines, upon such terms as may be agreed upon; but it shall be unlawful for any such company or companies, and the owner or owners of rights of way to contract for the exclusive use thereof for telegraphic purposes. (April 15, 1880: 77 v. 264.)

May Enter Upon and Appropriate Land

"Sec. 3456. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, *and may appropriate* so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers,, abutments wires, and other necessary fixtures, and for stations, and the right of way over such lands and

adjacent lands sufficient to enable it to construct and repair its lines. (62 v. 72, Sec. 1.)

LIMITATION UPON SUCH AUTHORITY

"Sec. 3457. No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or inclosure within which an edifice is situate, nor, in cases not provided for in section three thousand four hundred and sixty-one, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental tree. (62 v. 72, Sec. 1.)

WHEN THE LAND TO BE APPROPRIATED IS HELD BY A CORPORATION

"Sec. 3458. When lands *sought to be appropriated* for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase, or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to any other line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with the practical working of such telegraph. (62 v. 72, Sec. 2.)

WHEN SUCH LAND IS HELD BY A RAILROAD COMPANY

"Sec. 3459. The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when the company *seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts showing that* it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land; and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places as the court shall direct; but nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling stock of any railroad company for the purpose of transporting poles, materials, or the employes of such telegraph company, or for any other purpose whatever. (62 v. 72, Sec. 3.)

WHEN THE LANDS LIE IN MORE THAN ONE COUNTY

"Sec. 3460. Proceedings to appropriate lands to the use of a company, against a defendant whose adjoining or continuous lands lie in more than one county, may be instituted in any county in which any part of such lands lie, and the dam-

ages shall be assessed, in one proceeding, in respect of all such lands of the defendant sought to be appropriated, whether lying in the county wherein the court is sitting, or in other counties. (62 v. 72, Sec. 4.)

How Right to Use Public Ground Acquired

"Sec. 3461. When any lands authorized *to be appropriated* to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be *such as shall be agreed upon between the municipal authorities of the city or village and the company;* and if they can not agree, *or the municipal authorities unreasonably delay to enter into any agreement,* the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, Sec. 5.)"

* * * * *

Chapter Applies to Telephone Companies

"Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies.

ELECTRIC LIGHT COMPANIES: LAWS MADE APPLICABLE TO

"Sec. 3471a. The provisions of this chapter, *so far as the same may be applicable,* shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies. (January 26, 1887; 84 v. 7.)" (Italics ours.)

These sections as later amended are now found in General Code of Ohio, Sections 9172 to 9198.

Petitioner claims rights under Sections 3461 and 3454. It is to be noted that Section 3454 was adoptel in 1852 as part of the General Incorporation Act adopted in that year. Sections 3455 to 3461, inclusive, were all part of an Act of March 31, 1865, and are properly to be read together. The provisions of Section 3461 obviously govern in cases of inconsistency with the provisions of Section 3454.

The original enactments of the sections quoted above are set forth in Appendix A, *infra.*

(b) Analysis of Magnetic Telegraph Company Chapter

R. S. Sections 3454 to 3461, inclusive, are part of the incorporation statutes of the State of Ohio and deal with the powers secured by magnetic telegraph companies upon incorporation under the laws of the state. They clearly have no relationship to partnerships or

individuals. These sections constitute merely a grant of corporate franchise and do not give to corporations organized thereunder any easement or other vested property right to use the streets or other public places of municipal corporations. To secure such vested property right, compliance with the procedure provided in Section 3461 is required.

Sections 3455 to 3461, when read together, constitute a grant of the power of eminent domain to corporations organized thereunder, and nothing more. Sections 3456, 3457, 3458, and 3459 deal with the right of the corporation to appropriate the property of individuals and corporations. Section 3461 deals with the situation where property authorized to be appropriated by Section 3456 is subject to the easement of a municipal corporation. It fixes the procedure whereby such property may be appropriated. The procedure called for is either an agreement with the municipal corporation or an order of the Probate Court. The section clearly places the burden of securing an agreement or an order upon the company desiring to secure the easement in the particular streets or public places of a municipal corporation.

The provisions of Section 3454 with regard to the construction of telegraph lines along "any public road" are limited to locations outside of municipal corporations, locations within municipal corporations being covered by Section 3461, which was adopted at a later date. The public roads referred to in Section 3454 are those designated in *Title VII, R. S. of* 1890, being state roads, county roads, and township roads. The provisions of the Revised Statutes with regard to the streets, alleys,

and public places of municipalities are found in *Title XII, Division* 8, *Chapter* 13, *R. S. of* 1890, and are never referred to as "public roads" or "roads."

The interpretation of the Magnetic Telegraph Companies Chapter which we have suggested above, namely, that it confers upon companies organized thereunder only the inchoate right of eminent domain, rather than a vested easement or property right in the streets of municipal corporations, is in accord with *Zanesville vs. Zanesville Telegraph & Telephone Co.*, 64 O. S. 67 (1901). *R. S. Sec.* 3471 made the provisions of the Magnetic Telegraph Companies Statutes applicable to telephone companies organized thereunder. In the *Zanesville* case the telephone company had attempted to reach an agreement with the City of Zanesville relative to the use of its streets, but had been unsuccessful. It applied to the Probate Court for an order allowing it to use the streets of the city. The Probate Court refused the order upon the ground that *R. S. Sec.* 3461 was unconstitutional, being in violation of the doctrine of distribution of powers among the legislative, executive, and judicial branches of the state government. On the occasion of the first argument of the case, the judgment of the Probate Court was affirmed, 63 O. S. 442. Upon reargument, the judgment of the Probate Court was reversed, 64 O. S. 67. A careful reading of the opinion shows that the basis of the decision is the conclusion of the court that R. S. § 3461 confers upon corporations organized under the Magnetic Telegraph Company Chapter a right of eminent domain with respect to municipal property.

By stringing together sentences and parts of sentences irregularly taken from their context in the opin-

ion, Petitioner, at pages 57-59 of its brief, attempts to convince this court that *Zanesville vs. Zanesville Telegraph & Telephone Co.* supports its contention that incorporation under these statutes gave rise to a perpetual easement in its predecessors in title. We are confident that a consideration of the opinion itself by this court will expose the misconstruction of the opinion and the juggling of quotations which Petitioner has indulged in.

The Ohio Supreme Court did not hold that a magnetic telegraph company, telephone company or electric light company organized under these statutes secured by incorporation an easement in the streets of a municipal corporation. The references quoted by Petitioner to the franchise secured from the state must be read with the rest of the opinion. When so read, it is clear that the court regarded the right secured from the state as a right of eminent domain and not an easement or other vested property right.

Petitioner may contend, as it did in the lower courts, that the requirement of Section 3461 that the company desiring to use the streets and the municipal corporation enter into an agreement with regard to the mode of use of the streets, merely reserves to the municipal corporation the powers which it would have in any event under its general police powers to regulate the activities of the electric light company in the interest of public health and safety. The *Zanesville* case is direct authority against this proposition, for the case holds that the powers of the Probate Court in Section 3461 are not administrative or legislative but are the same as those which the court has in eminent domain proceedings. The

police power of a municipality is distinctly legislative in nature.

Queen City Telephone Co. vs. Cincinnati, 73 O. S. 64 (1905), also supports respondent's position that the Magnetic Telegraph Companies Chapter grants to companies organized thereunder at most the right of eminent domain as to the streets, alleys, and public places of municipal corporations. The plaintiff telephone company brought an action in the Probate Court asking for an order allowing it to put its telephone wires in conduits throughout the streets of the city. The questions before the Supreme Court were:

> "1. Was the Queen City Telephone Company so organized at the time it made application to the city, and later, as to give it a standing calling for action by the council and afterward by the Probate Court? 2. Even though the company were legally organized, did the petition filed in the Probate Court itself state a case warranting affirmative action in favor of the company by that court? 3. If the petition did state a case warranting such affirmative action, had that court power to grant a right to such company to place its wires and apparatus in conduits under ground?"

In holding that the plaintiff company was not so legally organized as to give it standing to maintain the action, the court says at page 77:

> "As held in *Zanesville vs. Tel. Co.,* 64 Ohio St. 67, *the proceeding is practically for an appropriation; that is, it partakes of the character of an exercise of the right of eminent domain.* In *Powers vs. Ry. Co.,* 33 Ohio St. 429, it is held that it is essential to a judgment of condemnation in an appropriation proceeding that the company should prove its corporate existence, and among

other things show that it has been fully organized by the election of directors. *Proof of the existence of the corporation and of its right to make the appropriation is also now required by Section 6420, Revised Statutes, and the determination by the court of those questions favorable to the company is made jurisdictional.* * * *" (Italics ours.)

The court also held that it was necessary to state in the petition what streets the company proposed to use and the proposed method of use, and that the company had no right to place its wires in conduits under Section 3461. In connection with the discussion of this subject, the court says at page 81:

"It is of course conceded as now well settled that the *general* power to occupy the streets of a municipality by a telephone company is derived from the state, as held in *Zanesville vs. Tel. Co., supra* and *Farmer vs. Tel. Co.,* 72 Ohio St. 526. (Referring to this last case, it may not be amiss here to remark that on page 532 the types make the writer say that the Probate Court is a substitute in all respects for the municipal authorities. This was not intended. The words 'as to rates,' which should precede the above statement have dropped out. Without them the statement is too broad.) *But, taking the sections of the statute as a whole and considering the conditions imposed on the exercise of such right, it is not to be inferred that the municipal authorities are stripped of all power to finally determine any matter relating to the general subject.* * * *" (Italics ours.)

This language must be read with the language quoted above from page 77, the general power referred to on page 81 being obviously the right of eminent domain discussed on page 77.

See also same case in Circuit Court, 5 O. C. C. (N.S.) 411.

The District Court in its memorandum opinion, relegates the consideration of respondent's contentions with regard to the rights accruing to the predecessors of the Ohio Electric Power Company by virtue of their incorporation in 1891 and 1895, respectively, to note 3 of his opinion. (R. 232.) At that point, by means of a rhetorical question, it is suggested that the holding of *Zanesville vs. Zanesville Telegraph & Telephone Co.*, 64 O. S. 67 (discussed *supra*, p. 62) that the companies organized under the Magnetic Telegraph Statutes secured only a right of eminent domain as to the streets of municipal corporations, is to be disregarded upon the theory that *R. S. Sec.* 3461 merely confirmed in the municipality its right to pass police regulations from time to time with regard to such companies. In support of this view, *Farmer vs. Telephone Co.*, 72 O. S. 526, 532, and *Telephone Co. vs. Cincinnati*, 73 O. S. 64, 81, are cited. The citation of *Telephone Co. vs. Cincinnati* for this proposition is surprising in view of the fact that the holding of the *Zanesville* case is therein reaffirmed. The petition of the telephone company was held to be properly dismissed for the reason that it did not fulfill the requirements of proof required by the statutes governing appropriation proceedings in the Probate Court.

Farmer vs. Telephone Co. simply held that the municipality could not require compensation for the use of its streets by a telephone company, in view of the express prohibition in R. S. Sec. 3461 against such compensation.

Ignoring the holdings of the *Zanesville* case and of *Telephone Co. vs. Cincinnati* is inconsistent with the

position of the court as stated in its memorandum opinion that it is bound to follow the law of Ohio as enunciated in these very cases, in view of the fact that the bondholders represented by the plaintiff secured their bonds upon the "faith" of this line of decisions.

The question asked by Judge Hahn in note 3 also ignores the express requirement in *R. S. Sec.* 3461 of an agreement between the municipal corporation and the utility. As suggested in the quotation from *Atlantic Coast Line vs. Goldsboro Co.*, 232 U. S. 548, inserted by Judge Hahn at this point, the "police power" is not a matter which is the subject of agreement. Again if the action of the municipal corporation or the Probate Court, under *R. S. Sec.* 3461, was merely an exercise of the police power, then clearly *Zanesville vs. Zanesville Telegraph & Telephone Co., supra,* would have been disposed of as it was in the original hearing by dismissing the petition upon the ground that the delegation of an exercise of the police power to the Probate Court constituted a violation of the doctrine of separation of powers, the police power being clearly legislative in nature.

Zanesville vs. Zanesville Telegraph & Telephone Company, supra, and *Queen City Telephone Company vs. Cincinnati, supra,* deal with the nature of the proceedings in Probate Court upon failure of the company to secure an agreement with the municipal corporation. They do not involve directly the question of the nature of the rights of such company where it has sought no agreement with the municipal corporation or order of the Probate Court or where whatever agreement it had with the municipal corporation has expired. Only two

Ohio cases directly consider such situations. They are: *State ex rel. vs. Central Union Telephone Co.*, 11 O. C. C. 55, and *State ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. Appeals 481, 121 O. S. 235. Both of these cases support the contention of the respondent that by incorporation petitioner's predecessors, The Incandescent Light & Power Company and The Northern Electric Company, received at most the capacity to secure an easement in the streets of the City of Norwalk and not a vested property right therein.

In *State ex rel. vs. Central Union Telephone Co.*, 11 O. C. C. 55 (1895), an action in *quo warranto* was brought to oust the telephone company from the streets of the City of Dayton. The question before the court was the right of the company to continue to occupy the streets of the City of Dayton after the expiration of a ten-year ordinance. In discussing this question, Judge Summers says at page 57:

> "The words 'when any lands authorized to be appropriated,' etc.," (used in Section 3461) "imply that the authority has been previously conferred, but in our opinion this is of little if any significance, for the sections are in *pari materia*," (referring to Sections 3454, 3456, and 3461) "and the franchise to so use the streets conferred by the state is upon the express condition that the mode of use shall be such as shall be agreed upon between the city and the company, and in the event that they cannot agree, that the Probate Court shall direct in what mode the telephone line shall be constructed along such street. *This clearly contemplates an agreement as to the mode of use prior to any occupancy of the streets by the company, and such agreement with the council or direction by the Probate Court as to the mode of*

use is inseparable from the right to use the street for telephone purposes and the right ceases with the expiration of the agreement or direction upon which it is conditioned. We do not understand counsel to claim that the company could have entered upon the streets and erected its poles and strung its wires without an agreement with council or direction in a proceeding in the Probate Court. If, then, it enters upon the streets, erects its poles and strings its wires under and by virtue of an agreement between it and the city council which limits its right to such occupancy to a period of ten years, how can it claim its right still stands when the foundation of it is gone? * * *

"These provisions" (*R. S. Sec.* 3283 dealing with the use of the streets of muncipal corporations by railroad companies) "are not unlike those of the section under consideration, and we think the construction we have given the latter warranted by that given by the Supreme Court to the former. *Railroad vs. Commissioners,* 31 Ohio St. 338; *State ex rel. vs. Railroad Co.,* 36 Ohio St. 434; *Railroad Co. vs. Cobb,* 35 Ohio St. 94.

" 'Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal bodies over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.' *Railroad Company vs. Defiance,* 52 Ohio St. 262." (Italics ours.)

The same case came before the same court in *State ex rel. Matthews vs. Central Union Telephone Co.,* 14 O. C. C. 273 (1897). Upon final hearing, the court refused a writ of *quo warranto* upon the ground that the

writ should not issue until it should appear that an agreement between the city and the telephone company could not be reached and the company delayed unreasonably to apply to the Probate Court for an order under *R. S. Sec.* 3461. There is nothing inconsistent between this opinion and the decision of the court in 11 O. C. C. 55. It is to be remembered that as to telephone companies, *R. S. Sec.* 3461 was still in effect in May, 1897, when this case came on before the Circuit Court for the second time. The telephone company therefore still had a right of eminent domain as to the streets of the City of Dayton. The refusal of the court to grant an order of ouster is merely an illustration of the doctrine that a court will not decree the doing of a futile act since the company could still bring an action in the Probate Court to appropriate the easement which would allow it to put its poles back upon the streets. The same result would be reached in the case of an action between a private individual and the public utility where the public utility was using the property of the private individual without having resorted to appropriation proceedings.

See *Smith vs. Central Dist. Tel. Co.*, 2 O. C. C. 259, 279 (1886).

The case in 14 O. C. C. 273 has no application here for the reason that the right of The Northern Electric Company to bring appropriation proceedings for the use of the streets of the City of Norwalk has been revoked by the Act of April 21, 1896, 92 *O. L.* 204, as we shall hereafter point out.

In *State of Ohio ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. App. 481, affirmed 121 O. S. 235 (for

opinions in full see Appendix B, *infra*), the Ohio Electric Power Company urged exactly the same propositions upon the Court of Appeals of Ohio and the Supreme Court of Ohio with regard to the effect of *R. S. Sec.* 3461, which petitioner urges here. The Court of Appeals held that since no action had ever been taken by The Incandescent Light & Power Company or The Northern Electric Company to secure an easement under *R. S. Sec.* 3461 prior to the revocation of the rights thereof by the Act of April 21, 1896, the Ohio Electric Power Company could claim no rights under such statutes. In other words, the Court of Appeals held that The Incandescent Light & Power Company and The Northern Electric Company secured by incorporation at most the capacity to acquire an easement in the streets of the City of Norwalk and did not by incorporation secure a vested easement. Upon this subject, the Court of Appeals says at pages 488-490:

> "Section 3461, Revised Statutes, now Sections 9178 and 9179, General Code, relates to appropriation proceedings by telegraph companies, and by enactment of Section 3471a, Revised Statutes (Section 9192, General Code), became applicable to electric light and power companies. This section (Section 3461, Revised Statutes) provides in substance that the 'mode of use' by any such company of the streets, alleys, etc., of any city or village, shall be such as shall be agreed upon by the municipal authorities thereof and the company, and, if they are unable to agree, the Probate Court in proceedings brought therein shall direct in what mode such line shall be constructed along such streets, alleys, etc. It is apparent, therefore, that on October 7, 1890, when the ordinance was passed by the City of Norwalk granting to the partnership, the Norwalk Incandescent Light Company,

its successors and assigns, the right to occupy the streets and public places of the city for the purposes therein stated, and thereafter, until April 21, 1896, when Section 3471a was amended (92 Ohio Laws 204), *neither a partnership nor any other person or company engaged in a like business was privileged to occupy the streets, alleys, etc., of any municipality in Ohio without either an agreement with the municipality or an order of the Probate Court directing the mode of such occupancy.* * * *

"Any of the corporate assignees of the partnership could at any time have sought to agree with the municipal authorities as to the mode of use of the streets, alleys, etc., of the city in the exercise of their corporate functions and authority; and, if agreement between them was not possible, might have instituted proceedings in the Probate Court of Huron County to effect this purpose. The Northern Electric Company which last occupied the streets, etc., of Norwalk, prior to April 21, 1896, when Section 3471a, Revised Statutes, was amended, might have so proceeded at the expiration of the time fixed in the ordinance. Not having done so, and having relied solely upon the ordinance, with its restrictive terms and conditions, until the time within which the proceedings authorized by Section 3461, Revised Statutes, might have been invoked had elapsed, we are of the opinion that the respondent cannot now claim to be possessed of any greater rights than the ordinance gave. If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; *and such*

agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. State ex rel. vs. Central Union Telephone Co., 11 C. C. 55, 5 C. D. 311." (Italics ours.)

The decision of the Court of Appeals was affirmed by the Supreme Court of Ohio. We submit that this court should give great weight to the decisions of the Court of Appeals of Huron County and the Supreme Court of Ohio dealing with the very situation which is involved in the present litigation.

City of Opelika vs. Opelika Sewer Co., 265 U. S. 215 (1924);

Southern Wisconsin Railroad Co. vs. Madison, 240 U. S. 457, 461;

Milwaukee Electric Railway Co. vs. Wisconsin, 252 U. S. 100;

Gilchrist vs. Interborough Rapid Transit Co., 279 U. S. 159, 208;

Old Colony Trust Company vs. City of Tacoma, 230 F. 389 (C. C. A. 9th, 1917).

Essentially the same question of construction of the statutes of Ohio came before the Circuit Court of Appeals for the Sixth Circuit in *Louisville Trust Co. vs. City of Cincinnati,* 76 F. 296 (1896, Taft, Lurton, and Hammond, JJ.). In that case plaintiff contended that by incorporation its mortgagor received a perpetual franchise to occupy the streets of the City of Cincinnati with an inclined plane railway. The basis of its claim was Section 12 of the General Incorporation Act of May 1, 1852 (*R. S. Sec.* 3283). This section, dealing with the method whereby railroads secured the right to occupy

the streets of municipalities, is almost the exact counterpart of *R. S. Sec.* 3461 (enacted as a supplementary provision to the same act). This court held, in accord with the contentions of the respondent here, that such statute did not confer a vested easement in the streets of a municipal corporation. Judge Lurton says at page 308:

> "The argument that, because the state had imposed no limitation upon the duration of the corporate franchises of this company, therefore the term for which it held its street grants was likewise intended to be unlimited, is illogical. It loses sight of the distinction between those franchises conferred by the state and obtained by organization under the state law and those property or contractual franchises not granted by the state, and not inherent in the corporation as such, but which come from the local authority having the right to grant the right to occupy a public highway. We do not mean to intimate that the municipal or local authority is the only source from which such an easement could come in Ohio. *The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer all such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements, upon terms and conditions to be agreed upon between such companies and the local government.* When, therefore, we come to construe an Ohio statute providing for the organization of either ordinary railway or street car companies, we may well do so with the expectation that this well-settled policy has not been departed from, and that the state has stopped with the grant of the usual and necessary corporate franchises proper, by which it has been endowed with power to operate its road for tolls, *when it shall have acquired from the local authority the equally*

essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business. That the state did not undertake, in the general incorporation act of May 1, 1852, to confer upon any of the class of corporations therein provided for the power to enter upon and occupy with its tracks the public streets of any city or village, or the public highway of any township or county, before obtaining the consent of the local authority concerned, is too clear for discussion. Section 12 of that act expressly provided how such street or highway rights might be obtained, that section being in these words:

"'Sec. 12. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way, or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; *and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act.*'

"*The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to*

agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant.'' (Italics ours.)

We submit that the same reasoning applies in construing *R. S. Sec.* 3461.

In *Pomona vs. Sunset Telephone Co.*, 224 U. S. 330, the Supreme Court of the United States placed a similar interpretation upon an analogous section of the Constitution of the State of California. As to this feature of the case, Mr. Justice Holmes says at page 342:

> ''The claim based upon the amendment to Article XI, Sec. 19, of the Constitution of the State, October 10, 1911, does not impress us. Before that date the article provided that in cities having no public works for artificial light, etc., individuals or corporations of the state duly authorized should have the privilege of using the streets, etc., for the purpose, upon the condition that the municipal government should have the right to regulate the charges. By the amendment 'any municipal corporation may establish and operate public works for * * * telephone service' either by construction or by purchase. It then goes on, 'Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.' We agree with the appellants that the amendment seems intended as a step in the direction of municipal ownership or control. The words 'upon such conditions,' etc., are not to be confined to police powers, which are conferred by Section 11 of the same article, but are of general import. *If the municipal corporation does not see fit to establish the public works itself*

it may let others do it, but its power to impose conditions excludes the notion that the Constitution alone is a grant to others of a right to occupy the streets without its consent.'' (Italics ours.)

See also

Southern Bell Telephone Co. vs. Richmond, 103 F. 31 (C. C. A. 4th, 1900);

Indianapolis vs. Consumers' Gas Trust Co., 144 F. 640 (C. C. A. 7th, 1906);

In re Rochester Railway Co., 123 N. Y. 351, 25 N. E. 381 (1890).

The statutes considered by the courts in the cases just cited empowered the municipal corporations to fix the ''terms and conditions'' of the occupation of its streets by the utility. The language used in R. S., Sec. 3461 is ''mode of use.'' The terms are synonymous. It seems probable that the term ''mode of use'' was chosen by the legislature to prevent any inconsistency between the grant of power to the city contained in Section 3461 and the prohibition contained in the last clause of the section against any compensation to the city for the use of its streets other than such as might be necessary to return the streets to their former state of usefulness.

An agreement as to ''mode of use'' contemplates provisions as to what streets are to be used, the type of construction, location of poles, nature of insulation, replacing of public property in as good condition as it was before construction, and payment to the city of money necessary for such purpose. *Queen City Telephone Co. vs. Cincinnati,* 73 O. S. 64, and see opinion of Judge Swing in 5 O. C. C. (N.S.) 411. The provisions of such agreement would necessarily vary in every particular

case, depending upon the nature and extent of the activities contemplated by the company, the nature of the municipality, and the type of electricity to be distributed by the company. The term for which the company was to use the streets under the easement secured by the particular agreement would have a definite bearing upon all of the other provisions of the agreement. In other words, the city by its power of agreement with the company had full control over the operations of the company in its streets, subject to the inhibition against receiving compensation above referred to, and subject to the possibility that the company might choose to secure an easement by an appropriation proceeding in Probate Court rather than accept the agreement required by the city. The municipal corporation would have no greater power if the words "terms and conditions" were substituted for "mode of use." In *Louisville Trust Co. vs. Cincinnati, supra,* the analogy is even more direct for the statute there under consideration provided for Probate Court proceedings in event of disagreement between the municipality and the utility.

The analysis made by Mr. Justice Clarke in *Hardin-Wyandot Lighting Co. vs. Upper Sandusky,* 251 U. S. 173, of *Revised Statutes, Sec.* 3461, and the effect of the later Act of April 21, 1896, thereon (see p. 100, *infra*) is in accord with respondent's position. He says at page 176:

> "As we have seen, when the ordinance of 1889 was passed the statute then in force provided that the 'mode' in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the company, but that if they failed to agree it must be deter-

mined by the Probate Court, and the amendment, now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets instead of the prior qualified control."

He further says at page 178:

"This act was a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the state, and all that it did was to give to the municipal authorities *complete control* over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, *instead of the like control* which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets." (Italics ours.)

We therefore submit that *Louisville Trust Co. vs. Cincinnati, supra; Pomona vs. Sunset Telephone Co., supra; Indianapolis vs. Consumers' Gas Trust Co., supra,* and *In re Rochester Railway Co., supra,* dealing with the power of a municipality under analogous statutes, are in point here.

(c) Analysis of Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 93 O. S. 428 (Affirmed, 251 U. S. 173)

Petitioner contends that this court is precluded from following the interpretation placed upon the statutes of Ohio by the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio in *State ex rel. Martin vs. Ohio Electric Power Company, supra,* by the decision of the Supreme Court of Ohio in *Hardin-Wyandot*

Co. vs. Village of Upper Sandusky, 93 O. S. 428 (1916). Petitioner, we believe, also relies in this regard upon *Zanesville vs. Zanesville Telegraph & Telephone Co.*, 64 O. S. 67 (1901), and *Queen City Telephone Co. vs. Cincinnati*, 73 O. S. 64. These cases, however, as shown at pages 66 to 81, *supra*, support respondent's contentions rather than those of the petitioner.

It is petitioner's position that the bondholders whom it represents were entitled to rely upon *Hardin-Wyandot Co. vs. Village of Upper Sandusky* and that a later decision contrary to the *Hardin-Wyandot Co.* case cannot adversely affect such bondholders. This contention of petitioner is based upon the so-called doctrine of *Gelpcke vs. Dubuque* (1 Wallace 175). We submit that no such extension of *Gelpcke vs. Dubuque* should be sustained. Assuming, however, for the purposes of the present argument that the doctrine of *Gelpcke vs. Dubuque* of estoppel against change of judicial decision with regard to interpretation of state statutes is applicable to the interpretation of the statutes dealing with corporate franchises to the same extent that it is applicable to the statutes dealing with the validity of municipal bonds, we submit that before the doctrine has any application it must be shown that there was a *clear* decision of the question of interpretation involved from which the courts of the state have deviated. Certainly bondholders are not entitled to rely upon *obiter* which may have crept into cases not dealing with the question which is now before this court.

The fact that the decision of the District Court, as reflected in its memorandum opinion (R. pp. 211 to 239), is based upon an acceptance of petitioner's contentions

as to the effect of *Hardin-Wyandot Lighting Co. vs. Upper Sandusky* calls for a careful consideration of that case.

Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky does not estop respondent from urging the interpretation of the statutes of Ohio which it has set forth above, for the following reasons:

1. The question now before this court was not before the Supreme Court of Ohio in that case.

2. The actual decision of the court gave effect to and enforced a municipal ordinance relating to the right to use its streets, and such decision is only consistent with the interpretation which the respondent has placed upon the statutes now before this court.

3. The language of the case, if read in the light of the authorities cited, is clearly consistent with respondent's interpretation of the statutes in question.

(1) Different Question Involved in Hardin-Wyandot Co. vs. Upper Sandusky

In *Hardin-Wyandot Co. vs. Upper Sandusky* the Village of Upper Sandusky brought an action *to enjoin* the lighting company from continuing to occupy the streets, alleys, and public places of the village and from extending its electrical distribution equipment. On March 4, 1889, the village passed an ordinance granting a franchise to the Citizens Electric Light and Power Company unlimited as to term, and in the same ordinance made a contract with the city for a fixed period of time for the lighting of the public thoroughfares. Under that ordinance the company built a complete system for fur-

nishing commercial and public lighting. Upon the expiration of the public lighting contract, the company and the city could not agree upon the terms of a new contract for public lighting, and the company abandoned its public lighting equipment.

The Court of Common Pleas dismissed the bill and gave judgment for the defendant. The Court of Appeals reversed the judgment of the Court of Common Pleas and *granted an injunction as to extensions of the commercial system of the lighting company,* but refused any injunction as to the existing system of the lighting company upon the ground that *quo warranto* and not injunction was the proper remedy to oust the lighting company from the streets of the village.

The lighting company appealed from the decision of the Court of Appeals enjoining the extension of its lines. The village did not appeal from the decision of the Court of Appeals refusing an injunction as to existing lines.

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals enjoining the lighting company from extending its lines, upon the ground that the abandonment of the public lighting equipment constituted a violation of the *municipal franchise* of March 4, 1889. In view of the basis of decision, all of the discussion in the case with regard to rights secured by the lighting company from the State of Ohio through the incorporation of its predecessor in 1892 is obviously *obiter.* The question of the basis of the rights of the company as to its existing system was not before the Supreme Court of Ohio for the reason that the village took no appeal on that phase of the case. That the decision of the case was placed squarely upon a violation of the municipal ordinance of

March 4, 1889, is shown by the following excerpt from Judge Johnson's opinion (93 O. S. 428, 442):

> "However, as pointed out, *the ordinance in question here* was passed in 1889, while the Act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it. We are compelled to assume that the allegations of the petition were sustained by the evidence, and that the defendant, without the knowledge or consent of the plaintiff, removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatever for the purposes of public lighting. *It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise which was accepted by the predecessor of the plaintiff in error.*
>
> "In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law.
>
> "The judgment and decree of the Court of Appeals will, therefore, be affirmed." (Italics ours.)

(2) The Decision Is Consistent Only With Interpretation of Statutes Urged by Respondent

In the *Hardin-Wyandot* case the Citizens Electric Light and Power Company secured from the Village of Upper Sandusky a franchise unlimited in term. The lighting company contended that the municipal franchise of March 4, 1889, was of no importance or effect, for the reason that the lighting company had secured a vested easement right to use the streets of the village by virtue of its incorporation in 1889. In holding that a violation of such franchise ordinance of 1889 constituted grounds for injunction against extensions to the system of the lighting company, the Supreme Court of Ohio in effect denied the lighting company's contention that it secured a vested easement merely by incorporation and that the municipal franchise of 1889 was of no importance. The actual decision of *Hardin-Wyandot Company vs. Village of Upper Sandusky,* based as it is upon the validity of the municipal franchise ordinance of 1889, is consistent only with respondent's interpretation of the statutes in effect at that time.

(3) The Opinion Supports Respondent's Contentions

The language upon which petitioner relies in *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky* to support its contentions with respect to the proper interpretation of R. S. 3461 is the following (p. 439):

> "This act did not repeal the Act of May 12, 1886, *supra,* in express terms, but when the two acts are construed together it is clear that it was

> the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' *This was the state of the law at the time of the granting of the franchise* (March 4, 1889) *which is involved in this case.* Therefore, under the holdings in the cases cited, the grantee company derived its *general* power to occupy the streets from the state." (Italics ours.)

If the above quotation is given the effect which petitioner contends for it, it becomes upon scrutiny absurd. Petitioner contends that the language quoted means that an electric light company incorporated between 1887 and 1896 received by incorporation a complete and vested easement to use the streets of any or all municipal corporations of Ohio. If such were the case, the date of the granting of the franchise referred to in the above quotation would be the date of the incorporation of Citizens Electric Light and Power Company and not the date of the passage of the municipal ordinance, which was March 4, 1889. It is clear from the quotation given above that the court regarded the municipal franchise ordinance as essential to the claim of easement made by the lighting company in that case. The words "general power" must be taken to mean capacity to secure an easement by compliance with the procedure required by *R. S. Sec.* 3461, namely, by entering into an agreement with the municipal corporation or securing an order from the Probate Court.

On the basis of the foregoing analysis, we submit that *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky* should not prevent this court from consider-

ing and following the interpretation placed upon the statutes in question by the Supreme Court of Ohio in *State of Ohio ex rel. Martin vs. Ohio Electric Power Company, supra,* and the interpretation placed upon the counterpart of such statutes by the Circuit Court of Appeals in *Louisville Trust Co. vs. Cincinnati, supra.*

(d) Results of Following the Interpretation Urged by Petitioner

In interpreting the statutes involved in this case, this court may properly consider the results of adopting the respective constructions suggested by the petitioner and by the respondent. Petitioner contends that by incorporation alone, its predecessors, The Incandescent Light & Power Company and The Northern Electric Company secured a complete and vested right to use the streets, alleys, and public places of the City of Norwalk, and that such right was assignable and not subject to revocation or amendment. We submit that if petitioner's contention is correct, it follows that every electric light company incorporated between 1887 and 1896, every telephone company incorporated between 1880 and the present time, and all telegraph companies incorporated under the laws of Ohio between 1854 and the present time, or any assignee or successor of such companies (whether an individual, an Ohio corporation, or a foreign corporation), may now go upon the streets, alleys, and public places of any municipal corporation of the State of Ohio with their poles, wires, and other equipment, and that the only power which the municipal corporations of Ohio might exercise

over such company or individual is that of general police regulation. We submit that such wholesale creation of easements by incorporation alone is an absurd result which could not have been intended by the legislature.

In *Pawhuska vs. Pawhuska Oil & Gas Co.*, 28 Okla. 563, the claim was made that an Oklahoma statute relating to pipe line companies, closely analogous in language to R. S., Sec. 3461, should be given the construction which plaintiff urges upon this court. The court says at page 568:

> "To construe Section 12 as contended for by the plaintiff in error would be tantamount to holding that it was a grant of a perpetual blanket franchise to every domestic pipe line corporation, as to every town or city of the state. Without determining whether the authority to grant franchises as to cities and towns is exclusively lodged in the municipalities, or may be exercised also by the legislature, it not being clear that it was the intention of the legislature by said section to grant such a blanket franchise, and under the rule that as to every party claiming a special privilege or exemption the burden of establishing the same rests upon such party, and a strict construction obtaining against said party (*Oklahoma City vs. Shields*, 22 Okla. 265, 100 Pac. 559), we hold that the defendant in error, by virtue of said Section 12, has not, without more, a franchise to lay, use, and maintain gas pipes and mains, with all necessary and proper attachments and connections and appurtenances, upon and below the surface of the streets, alleys, sidewalks, etc., of the City of Pawhuska, for the purpose of maintaining a system of gasworks in said city, to sell and supply gas to it and its inhabitants."

The same claim of perpetual easement by incorporation was made in *Toronto Electric Light Co. vs. City of Toronto,* 33 Ont. L. Rep. 267 (affirmed by the Privy Council, 1917 A. C. 84), a case closely analogous to the case at bar. The Ontario court and the Privy Council found such an interpretation of the statute there applicable to be unreasonable.

Petitioner may contend that the rights of The Incandescent Light & Power Company and The Northern Electric Company were confined to the City of Norwalk by virtue of the fact that their principal place of business was to be conducted there. We call attention to the provision of *R. S. Sec.* 3455 (*supra,* p. 58) which makes the location of the business of the company as stated in its articles of incorporation immaterial and confers upon companies created under Chapter 4 the power to exercise rights granted thereby throughout the State of Ohio. It is clear under the incorporation laws of the State of Ohio that a corporation is not confined, in its operations, to the place named in its charter as the principal place where its business will be carried on. In making such contention, the petitioner seeks to read into the statutes something which is obviously not there in order to avoid the absurd result which follows from the interpretation which plaintiff places upon these statutes.

We submit that the interpretation of the statutes in question urged by the respondent is a reasonable interpretation supported by the authorities and in harmony with the policy of the State of Ohio relating to the creation of easements in the streets of its municipal corporations. We shall next show that under such interpreta-

tion petitioner holds no right to have its mortgagor, Ohio Electric Power Company, occupy the streets, alleys, and public places of the City of Norwalk.

2. The Petitioner's Predecessors in Title Did Not Comply With the Provisions of Revised Statutes, Sec. 3461, Requiring an Agreement With the Respondent or an Order of the Probate Court, and Petitioner Can, Therefore, Claim No Rights Under Such Section.

No order from the Probate Court was ever secured by The Incandescent Light & Power Company or The Northern Electric Company, or by the petitioner or any of its predecessors in title. It therefore is incumbent upon the petitioner to show that The Incandescent Light & Power Company or The Northern Electric Company secured an agreement with the City of Norwalk as to the mode of use of the streets, alleys, and public places of the city.

Petitioner finds such agreement in the ordinance of October 7, 1890, granting to The Norwalk Incandescent Light Company, the partnership, a right of way in the streets, alleys, and public places of the City of Norwalk, subject to certain conditions, for a term of twenty years. Petitioner urges that the ordinance of October 7, 1890, was invalid, null, and void for the purpose for which it was intended by the city and The Norwalk Incandescent Light Company, the original contracting parties (the creation of a binding 20-year contract), but that it remained dormant until resuscitated by the incorporation of the successors of the partnership almost a year later, and then not as a contract but as a police regulation pur-

porting to be in compliance with *R. S. Sec.* 3461. Petitioner's claim violates fundamental principles of contractual and statutory construction in that it ignores entirely the obvious intent of the parties as expressed in the ordinance itself and attempts to construct for the parties a fictitious intention in line with the petitioner's requirements in order that it may prevail in this case. The obvious intention of the city authorities was to make a present substantive grant of easement to the partnership, and the grant so made was accepted as such by the partnership. This ordinance was either a valid and complete grant of right of way limited in term, or was a nullity. It neither created nor confirmed any easement rights under *R. S. Sec.* 3461. *State of Ohio ex rel. Martin vs. Ohio Electric Power Co.*, 35 Ohio App. 481, affirmed 121 Ohio State 235 (for opinions in full see Appendix B). It is conceded that the partnership could secure no rights under *R. S Sec.* 3461.

Queen City Telephone Co. vs. Cincinnati, 73 O. S. 64.

Petitioner contends that the ordinance of October 7, 1890, was intended to serve two purposes, namely: the grant of a right of way to the partnership and the tender of an agreement under *R. S. Sec.* 3461 to any corporation organized thereunder. If the ordinance is so construed it was invalid under the provisions of *R. S. Sec.* 6494, which provided that no ordinance, resolution, or by-law of a city council should contain more than one subject. This provision is mandatory.

Bloom vs. Xenia, 32 O. S. 461;
Campbell vs. Cincinnati, 49 O. S. 463;
Heffner vs. Toledo, 75 O. S. 413.

If the ordinance of October 7, 1890, was invalid because *ultra vires* the City of Norwalk, there was no agreement between the city and The Incandescent Light & Power Company or The Northern Electric Company under *R. S. Sec.* 3461. If the ordinance constituted a valid enactment and gave rise to a binding contract between the City of Norwalk and The Norwalk Incandescent Light Company, the successors of the partnership became bound by the terms thereof and all rights thereunder expired October 7, 1910.

Petitioner's attempt to stretch the clear provisions of this ordinance into a vague and illusory offer of agreement to corporations not in existence upon the date of its passage illustrates the weak and tenuous nature of petitioner's entire claim of perpetual franchise flowing from the incorporation of The Incandescent Light & Power Company and The Northern Electric Company in 1891 and 1895, respectively. Petitioner apparently recognizes that something more than mere incorporation was necessary to confer easements in the streets of the respondent city upon its predecessors.

Petitioner's assertion that the intention of the partnership to organize a corporation was made known to the Norwalk City Council before the adoption of the ordinance of October 7, 1890, is entirely unsupported by the record. Judge Suhr, the only witness testifying on the point, stated that he had no recollection on the subject (R. 61). His statement appearing on the same page of the record that the partners told the council what they planned to do obviously refers only to the change in the method of distribution of electricity, which re-

quired the adoption of a new ordinance on October 7, 1890, to supersede the ordinance of July 30, 1890, which made the use of the Heisler system of distribution mandatory (R. 61, 35, 36).

To bridge the gap created by the lack of any agreement between the City of Norwalk and the predecessors of the petitioner under *R. S. Sec.* 3461, petitioner suggests that this statute did not require a formal contract between the city and the utility and that only general police regulations from time to time were contemplated thereunder. This contention requires a deletion from the statute of the very definite language contained therein. The petitioner ignores entirely the words "or in case the municipal authorities unreasonably delay to *enter into any agreement.*" We submit that it is clear from the language of the section that a formal contract between the city and the utility is required.

The same contention was urged before and rejected by the Privy Council in *Toronto Electric Light Co., Ltd., vs. Toronto Corporation,* 1917, A. C. 84, affirming 33 Ont. L. R. 267. See especially the opinion of Lord Atkinson, 1917, A. C. at pages 90-91, and the opinion of Chief Justice Meredith, 33 Ont. L. R. at page 277.

See also:

Potter vs. Calumet Electric Street Railway Co., 158 F. 521 (C. C. N. D., Ill., 1908.)

If the section is ambiguous, the ambiguity is certainly to be resolved in favor of the requirement of a formal agreement rather than vague acquiescence or general police power regulation.

Blair vs. Chicago, 201 U. S. 400, 471.

Section 3461 must be read with *R. S. Sec.* 1693 which provided the method whereby cities might enter into contracts and agreements. This section reads as follows:

> "Ordinances, resolutions, and by-laws shall require for their passage or adoption the concurrence of a majority of all the members elected, except in case of a single vacancy in the members by death, resignation or otherwise, and such vacancy, by neglect or omission of the council or mayor shall not be filled as provided in section seventeen hundred and thirteen, Revised Statutes, in which case they shall require a majority of the members qualified to vote thereon until such vacancy be filled according to law, and the vote on their passage or adoption shall be taken by yeas and nays and recorded in the journal; *and no contract, agreement, or obligation shall be entered into except by an ordinance or resolution of the council,* nor any appropriation of money for any purpose be made except by an ordinance; every ordinance appropriating money shall contain an explicit statement of the uses and purposes for which the appropriation is made; *the power or authority to make a contract, agreement, or obligation to bind the corporation, or to make an appropriation shall not be delegated;* and every contract, agreement, or obligation, and every appropriation of money made contrary to the provisions of this section shall be void as against the corporation, but binding on the person or persons making it; but this section shall not be construed to impair the power of the board of public works, 'city commissioners,' in any city to make contracts, or impair the power to contract whenever elsewhere given in this title, or to delegate the power to execute such contracts." (Italics ours.)

The strict provisions of Section 1693 as to the method whereby cities might enter into agreements show clearly an intent that vague acquiescence is not to be considered a compliance with the requirement of agreement stipulated in *R. S. Sec.* 3461. The suggestion that no formal agreement is required does not appear in any of the Ohio cases dealing with this section. The requirements laid down in *Queen City Telephone Co. vs. Cincinnati,* 73 O. S. 64 (see especially the opinion of Judge Swing in 5 *O. C. C.* (*N.S.*) 411), for the bringing of an action in Probate Court under *R. S. Sec.* 3461, show that the Supreme Court of Ohio and the Circuit Court in that case regarded a formal agreement necessary to the creation of any rights under that section. An agreement between the City of Norwalk and either The Incandescent Light & Power Company or The Northern Electric Company was obviously impossible in either July or October, 1890, for neither company was then in existence. (Plaintiff's Exhibit 3, R. 282; Plaintiff's Exhibit 6, R. 289.)

It cannot be claimed that the conduct of the city in allowing the operation of the electrical distribution system erected under the ordinance estops the city from asserting that the ordinance did not constitute compliance by the plaintiff's predecessors with the provisions of *R. S. Sec.* 3461. The conduct of the city is plainly referable to what is considered its rights to be under the ordinance and when so considered it cannot be the basis of an estoppel.

Cleveland vs. Railway Co., 93 F. 113 (C. C. N. D., Ohio, 1899), (reversed on jurisdictional grounds, 147 F. 171.)

The estoppel arising from the conduct of the parties under the ordinance of October 7, 1890, operates against the petitioner rather than against the respondent city (*supra*, p. 45).

3. If the Ordinance of October 7, 1890, Be Considered as Constituting an Agreement With Respect to the Mode of Use of Respondent's Streets Under Revised Statutes Sec. 3461, All Rights Secured Thereunder Expired 20 Years From the Date of Such Ordinance.

Even if the ordinance of October 7, 1890, be regarded as an agreement between the City of Norwalk and The Incandescent Light & Power Company and The Northern Electric Company as to the use of the streets, alleys, and public places of the city under *R. S. Sec.* 3461, still the easement secured by such agreement was limited in term to twenty years by the express terms of the ordinance. A corporation with the power of eminent domain which enters into an agreement limited in term, granting to it a right of way, certainly cannot claim that it secures thereby a perpetual easement. The argument here advanced by the petitioner was made in *State vs. Central Union Telephone Co.*, 11 O. C. C. 55 (discussed at length, *supra*, p. 70). In denying this contention, Judge Summers says at page 57:

> "The words 'when any lands authorized to be appropriated,' etc., imply that the authority has been previously conferred; but, in our opinion, this is of little if any significance, for the sections are in *pari materia*, and the franchise to so use the streets, conferred by the state, is upon the express condition that the mode of use shall be such as shall be agreed upon between the city and

the company, and in the event they cannot agree, that the Probate Court shall direct in what mode the telephone line shall be constructed along such street. *This clearly contemplates an agreement as to the mode of use prior to any occupancy of the streets by the company, and such agreement with the council or direction by the Probate Court as to the mode of use is inseparable from the right to use the street for telephone purposes, and the right ceases with the expiration of the agreement or direction upon which it is conditioned.*

"We do not understand counsel to claim that the company could have entered upon the streets and erected its poles and strung its wires without an agreement with council or direction in a proceeding in the Probate Court. *If then it enters upon the streets, erects its poles and strings its wires under and by virtue of an agreement between it and the city council, which limits its right to such occupancy to a period of ten years, how can it claim its right still stands when the foundation of it is gone?*" (Italics ours.)

The same question was before the state courts in the *quo warranto* case, *State of Ohio ex rel. Martin vs. Ohio Electric Power Company*, 35 O. App. 481, affirmed 121 O. S. 235. The Court of Appeals said (p. 490):

"If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; *and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. State ex rel. vs. Central Union Telephone Co.*, 11 C. C. 55, 5 C. D. 311." (Italics ours.)

Likewise the plaintiff trust company in *Louisville Trust Co. vs. Cincinnati*, 76 F. 296 (discussed at length, *supra*, p. 75), argued that the term limitation in the ordinance under which it occupied the streets of the City of Cincinnati was of no effect. In denying this contention of the plaintiff trust company in that case, Judge Lurton says at page 308:

> "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant."

See also:

Railway Co. vs. Carthage, 36 O. S. 631 (1881);

Indianapolis vs. Consumers' Gas Trust Co., 144 F. 640 (C. C. A. 7th, 1906);

Federal Gas & Fuel Co. vs. Columbus, 96 O. S. 530;

Weedsport Electric Light Co. vs. Weedsport, 220 N. Y. 386, 115 N. E. 986 (1917).

The benefit secured by the utilities, in that Probate Court action became unnecessary, is sufficient consideration to support the term limitation contained in the ordinance. In addition a provision limiting the term of

occupation is certainly a reasonable part of a "mode of use" agreement since such term has a direct bearing on all other provisions of such agreement.

4. The Capacity of Petitioner's Predecessors in Title to Secure Any Easement Under Revised Statutes Sec. 3461 Was Terminated by the Act of April 21, 1896 (92 O. L. 204).

On April 21, 1896, The Northern Electric Company was operating the electrical distribution system either under an easement limited in term to twenty years from October 7, 1890, or at the sufferance of the city. As we have pointed out, The Northern Electric Company had no vested property right to occupy the streets, alleys, and public places of the City of Norwalk after the expiration of such twenty-year term. On April 21, 1896, the following act of the legislature of Ohio became effective:

"AN ACT

"To amend Section 3471a of the Revised Statutes of Ohio.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that Section 3471a, as enacted January 26, 1887 (84 O. L. 7), be and the said section hereby is amended so as to read as follows:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the

same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct *or maintain* any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, *without the consent of such municipality;* and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; *but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court.* Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; *and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal in any circuit court of the state.*

"Section 2. That said Section 3471a shall be and the same hereby is repealed, and this act shall take effect and be in force from and after its passage. * * *"

The effect of this statute was to make *R. S. Sec.* 3461 inapplicable to electric light companies. The statute is clearly intended to apply to companies theretofore incorporated and to existing systems. This intent

is evidenced by the fact that no person or company is to "construct *or maintain*" any electrical distribution system in any street, alley, etc., of any municipal corporation without the consent of such municipality. That it was intended to apply to companies theretofore organized is also shown by the fact that the act expressly excepts rights theretofore secured by proceedings in Probate Court, while expressly including actions then pending in Probate Court or on appeal. The omission of this part of the statute by Petitioner in the quotation appearing at page 56 of its brief is significant since this provision is inconsistent with Petitioner's contention at page 101 that the statute was prospective in operation only and was not intended to affect the rights of electric light companies theretofore incorporated. This statute shows clearly that the legislature of Ohio was of the opinion that the easement to use the streets, alleys, and public places of a municipal corporation did not accrue to an electric light company upon incorporation, for it refers to "rights which have heretofore been received and exercised through proceedings of any Probate Court." It was of course unnecessary to make an express exception of easements, whether limited in term or not, secured through agreements with municipal corporations under *R. S. Sec.* 3461, since such rights were in accord with the provisions of the act.

The effect of the Act of April 21, 1896, was to terminate such inchoate power of eminent domain with respect to securing an easement in the streets of respondent as The Northern Electric Company then had. It is clear therefore that The Northern Electric Company could not assign such right to its successor, The Norwalk

Gas & Electric Company, in 1900 (Ex. 9, R. 296), or to the Ohio Electric Power Company by intermediate assignments. After April 21, 1896, a further grant of easement from the City of Norwalk was necessary before any right to occupy the streets, alleys, and public places of the City of Norwalk, after the expiration of the twenty-year term limitation of the ordinance of October 7, 1890, could be secured by The Northern Electric Company or any of its successors. The consent of the city is required. A proceeding in Probate Court or in a court of equity is not a substitute for such consent.

Respondent's position as to the effect of the Act of April 21, 1896, is sustained by the Supreme Court of the United States in *Hardin-Wyandot Co. vs. Upper Sandusky*, 251 U. S. 173 (affirming *Hardin-Wyandot Co. vs. Upper Sandusky*, 93 O. S. 428). Mr. Justice Clarke says at page 178:

> "This act" (the Act of April 21, 1896) "was a general one, *applicable to all electric lighting companies then operating*, or which might thereafter operate, in the state, and all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, *instead of the like control* which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets." (Italics ours.)

The Court of Appeals of Huron County in *State ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. App. 481, affirmed 121 O. S. 235, construed this statute in accordance with respondent's contentions. (Opinions in full, Appendix B, *infra.*)

The Act of April 21, 1896, so Construed Does Not Result in the Impairment of the Obligation of Contract

The validity of the very statute which we are here considering was before the Supreme Court of the United States in *Hardin-Wyandot Co. vs. Upper Sandusky*, 251 U. S. 173 (1919). The court held that the statute applied to all electric lighting companies then operating, as shown by the quotation from the opinion of Mr. Justice Clarke given above. The act was held valid as a reasonable exercise of the police power.

The act is also valid because it falls within the powers of the legislature of Ohio under Article I, Section 2, and Article XIII, Section 2 of the Ohio Constitution of 1852.

Article I, Section 2, reads as follows:

> "Sec. 2. Where Political Power Vested; Special Privileges.
>
> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly."

Article XIII, Section 2, reads as follows:

> Sec. 2. General Acts of Incorporation.
>
> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of the stocks and se-

curities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company, or individual."

See *Hamilton Gas Light Co. vs. Hamilton City*, 146 U. S. 258, 269.

The question of the right of the State of Ohio to revoke, amend, or curtail the unexercised power of eminent domain of one of its corporate creatures is considered in *Sears, Trustee, vs. City of Akron*, 246 U. S. 242 (1918). In that case the trustee of a bond issue of the Cuyahoga River Power Company brought an action to restrain the City of Akron from using the water of two rivers under an act of the legislature passed in 1912, granting the city the right to divert and forever use such rivers for its water supply. The power company was organized in 1908 under a statute (General Code of Ohio, Section 10128), which provided that the company might enter private lands for the purpose of surveying lands for water power development, and could appropriate such land as was necessary for its development projects. Its articles of incorporation listed the two rivers used by the City of Akron along with one other river as places where the water power of the company would be developed.

The act of the legislature granting the use of the rivers to the City of Akron was passed after the company had made surveys, but before any condemnation proceedings had been completed. The trustee claimed that the action of the city in appropriating the water-

shed constituted an impairment of obligation of a contract between the state and the company which had been assigned to the trustee as security for the bondholders, and that the act of the city constituted a deprivation of the property of the trustee without due process of law.

The bill was dismissed in the District Court upon the ground that the company did not possess any contract right which was impaired. A direct appeal was taken to the Supreme Court of the United States.

Upon the question of impairment of the obligation of the contract, Mr. Justice Brandeis says, at page 248:

> "First. As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the state granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1912 is a law which impairs that contract in violation of Article I, Section 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the state with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. *St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners,* 168 U. S. 349, 371. The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant. If by purchase or by right of eminent domain under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may other-

wise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter. Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the state's reserved power to amend or repeal, as provided in Art. XIII, Sec. 2, of the Ohio Constitution. *Ramapo Water Co. vs. City of New York,* 236 U. S. 579, 583. The Act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that is necessary to justify the proceeding of the city, which the act authorized. See *State vs. City of Hamilton,* 47 Ohio St. 52, 74; *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S. 258; *Berea College vs. Kentucky,* 211 U. S. 45, 57."

As to the alleged property rights of the company, Mr. Justice Brandeis says, at page 249:

"Second: As to the alleged property rights: It follows from what has been said above, that at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan, or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such

right to appropriate property until it had been acted upon by acquiring the property authorized to be taken, *Adirondack Ry. Co. vs. New York State,* 176 U. S. 335; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. * * *"

A somewhat analogous question was before the Supreme Court of the United States in *Cuyahoga Company vs. Northern Ohio Co.,* 252 U. S. 388 (1920). Mr. Justice McKenna, who wrote the opinion of the court, cites with approval *Sears vs. City of Akron, supra,* and decides the case upon that authority.

In *Adirondack Ry. Co. vs. New York State,* 176 U. S. 335 (1900), Mr. Chief Justice Fuller, who delivered the opinion of the court, says, at page 344:

"Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a corporation of the fruits already reduced to possession or contracts lawfully made. *But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope.* * * *" (Italics ours.)

See also:

Underground Railway Co. vs. City of New York, 193 U. S. 416 (1904);

Ramapo Water Co. vs. City of New York, 236 U. S. 579 (1915);

Baltimore & Susquehanna R. R. Co. vs. Nesbit, 10 How. (51 U. S.) 395 (1850).

In view of the authorities cited above, we submit that the Act of April 21, 1896, did not constitute an impairment of obligation of contract or a deprivation of property without due process of law, even though it did revoke such unexercised power of eminent domain as to the streets of the City of Norwalk as The Northern Electric Company had before its passage, and required the consent of the City of Norwalk to the acquiring of any easement in its streets beyond the term of the ordinance of October 7, 1890. No such consent having been secured after October 7, 1910, the petitioner's mortgagor is now occupying the streets of the respondent city at the sufferance of the city and the petitioner is not entitled to the injunction against the ouster of its mortgagor granted by the District Court.

5. Any Capacity Secured by Petitioner's Predecessors in Title Upon Incorporation to Acquire an Easement by Complying With the Provisions of Revised Statutes Sec. 3461 Was Not Assignable and Is Not Now Held by Ohio Electric Power Company.

The Incandescent Light & Power Company and The Northern Electric Company secured, upon incorporation, at most, the capacity to acquire an easement in the streets of the City of Norwalk. This was a right of eminent domain rather than a vested property right. This capacity of the respective companies was part of their franchise to be a corporation and as such was not assignable.

Under the law of Ohio the franchise to be a corporation is not assignable.

Ohio vs. Sherman, 22 O. S. 411 (1872);
Shields vs. Ohio, 95 U. S. 319 (1877).

Moreover, under the law of Ohio the right of eminent domain is a right in furtherance of the franchise to to be a corporation and cannot be disassociated therefrom.

Coe vs. The Columbus, Piqua and Indiana Railroad Company, 10 O. St. 372, 389, involved, among other things, the right of a corporation to mortgage its right of eminent domain. The court held that while the Railroad Company in question could mortgage the real property which it had secured by exercise of the right of eminent domain, it could not mortgage the unexercised right of eminent domain. Upon this subject the court says:

> "* * * We certainly can not hold that such a delegation of the power of eminent domain can be made the subject of grant or of sale."

The same question was before the Supreme Court of Ohio in *Atkinson et al. vs. The Marietta & Cincinnati Railroad Company,* 15 O. St. 21. Under the express authority of a special act of the legislature an attempt was made to transfer the properties and franchise, including the right of eminent domain, of an insolvent railroad company to a group of individuals. Judge Ranney says at page 36:

> "* * * It is hardly necessary to add, that a delegation of the power of eminent domain to a corporation as a necessary means to carry into

effect the grant of its franchises, can not be made the subject of either grant or sale. These principles were so fully considered, and explicitly stated, in *Coe vs. The Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St. Rep. 372, as to require no further comments from us."

Queen City Telephone Company vs. Cincinnati, supra, supports our contention that the unexercised capacity of The Incandescent Light & Power Company and The Northern Electric Company to acquire an easement in the streets of the City of Norwalk was not assignable. The court held that in order to bring the action in Probate Court, provided for in *R. S.* 3461, the plaintiff corporation was required to prove proper and complete organization. It is absurd to contend, in view of the court's holding in *Queen City Telephone Co. vs. Cincinnati*, that complete corporate organization was necessary before an action could be brought in Probate Court under *R. S.* 3461, that immediately after proper corporate organization the Queen City Telephone Company could have assigned all its rights and franchises to an individual and could thereby have conferred upon such individual all of the rights and capacities which it secured upon organization in respect to the streets, alleys, and public places of the City of Cincinnati.

In the present case The Incandescent Light & Power Company assigned its property and "franchises" for the benefit of creditors, and the trustees in turn assigned the same to two individuals (Ex. 71, R. 473; Ex. 5, R. 287). If petitioner is correct in its contention as to the assignability of the rights secured by The Incandescent Light & Power Company upon incorporation, George P. Jones

and Mayme C. Foster, on May 7, 1895, secured by assignment the rights which the Supreme Court of Ohio held in *Queen City Telephone Co. vs. Cincinnati,* could only be secured by complete corporate organization.

Another individual, Victor Emanuel (Exs. 14, 14A, 15, 16, 17, and 18, R. 329-342), appears in petitioner's claim of title. Petitioner must likewise claim that he secured the right of eminent domain. It would be as sensible to argue that although complete and proper organization under the law of Ohio was necessary to secure rights under *R. S. Sec.* 3461, still immediately after such organization The Incandescent Light & Power Company or The Northern Electric Company could have conferred full power thereunder on a foreign corporation. (See *Postal Tel. Cable Co. vs. C. C. C. & St. L. Ry. Co.,* 94 F. 234 (C. C. N. D., Ohio, 1899) holding that foreign corporations secured no rights under *R. S. Sec.* 3461.) General Code of Ohio Sections 614-2 and 614-2a cited by petitioner have no bearing on the situation. They relate only to the power of the Public Utilities Commission to regulate public utilities and do not relate to the capacity of individuals to exercise rights such as those here in question.

It is clear that after April 21, 1896, corporations organized for the purpose of distributing electricity, secured by incorporation no rights to occupy the streets, alleys, and public places of municipal organizations under *R. S. Sec.* 3461. Even if the Act of April 21, 1896, did not revoke the capacity of The Northern Electric Company to secure an easement in the streets of the City of Norwalk under *R. S. Sec.* 3461, still such capacity, not being assignable, did not pass to The Norwalk Gas &

Electric Company on May 8, 1900, under the deed conveying the electrical distribution system of The Northern Gas & Electric Company (change of name from The Northern Electric Company) to that company (Ex. 9, R. 296). The Norwalk Gas & Electric Company, having been incorporated April 20, 1900 (Ex. 8, R. 294), secured no such capacity by incorporation. It follows that the Ohio Electric Power Company, petitioner's mortgagor, as assignee of the Norwalk Gas & Electric Company by intermediate assignments, has no capacity to secure or exercise an easement in the streets of the City of Norwalk under *R. S. Sec.* 3461.

Ohio Public Service Co. vs. State ex rel. Fritz, 274 U. S. 12 (1927), and the other cases cited by petitioner upon this subject are to be distinguished from the present situation, for in all such cases the right held to be assignable was the vested easement arising from a municipal franchise ordinance unlimited in term rather than the unexercised right or capacity of eminent domain. Such cases should be compared with *Shields vs. Ohio,* 95 U. S. 319, which holds that upon consolidation of railroad companies under the statutes of Ohio, the resulting company takes only the corporate franchise rights granted to a company incorporated at the time of the consolidation and does not secure the corporate franchise rights which belonged to the companies which were parties to such consolidation. One of the transfers in the chain of title of the Ohio Electric Power Company to the electrical distribution system in the City of Norwalk was by agreement of consolidation (Ex. 12, R. 313). This consolidation was under the same statutory provision as the one before the court in *Shields vs. Ohio, supra.* The con-

solidated company, The Cleveland, Southwestern & Columbus Railway Company, upon coming into existence, secured only the rights accruing to corporations organized for the distribution of electricity on February 5, 1907. Such rights did not include the power of eminent domain as to the streets of municipalities granted by *R. S. Sec.* 3461.

6. The Ordinance of July 1, 1924, Has No Bearing Upon This Case. It Does Not Constitute a Grant of Easement or an Agreement of Any Sort

A large part of the evidence introduced by the petitioner at the hearing of this case dealt with the ordinance of the City of Norwalk of July 1, 1924 (Petitioner's Exhibit 38, R. 438), and the conduct of the city officials thereunder (see Petitioner's Exhibits 51 to 69, inclusive, R. 457-471). The title and first section of the ordinance are as follows:

"CONSTRUCTION AND MAINTENANCE OF ELECTRIC LIGHT AND POWER WIRES

AN ORDINANCE

"Be it ordained by the Council of the City of Norwalk, Ohio, three-fourths of all members elected thereto concurring, as follows:

"Section 1. That all electric light and power wires, telephone, signal and trolley wires in operation in the corporate limits of the City of Norwalk, Ohio, shall be constructed and maintained in accordance with the following specifications, in regard to clearances, spacing, heights and positions.

> Duplicate pole lines shall be avoided where possible and safety of the public and workmen must be given first consideration in constructing all lines."

The ordinance proceeds to make detailed provisions with regard to specifications for poles, wires, cross-arms, etc. No companies or individuals are specifically referred to in the ordinance.

At the time of the passage of this ordinance The Cleveland, Southwestern Railway & Light Company was operating the electrical distribution system now operated by the Ohio Electric Power Company. There were then at least eight other companies having wires carrying electricity within the city (Preston, R. 178). The ordinance is still in effect (Answer to Third Amendment and Supplement to Bill of Complaint, R. 47).

This ordinance was apparently injected into this case by the petitioner by the filing of the third amendment and supplement to the bill of complaint on the day that the final hearing commenced (R. 46), in the hope that it might bolster up a fatal weakness in its case, namely, the absence of any grant of easement beyond October 7, 1910, the date of the expiration of the municipal franchise ordinance. Petitioner claims that this ordinance constitutes "a consent by said city to the use of its streets and public ways and an agreement as to the mode of such use by the Ohio Electric Power Company and its several predecessors." (R. 46.)

We submit that the ordinance of July 1, 1924, is entirely immaterial and irrelevant to the issues of the case. The ordinance on its face clearly indicates that it is not in any sense an agreement between the city and any of the various companies then having wires carrying elec-

tric current within the city. It certainly cannot be construed to the consent to the use of the streets of the city required by the Act of April 21, 1896. (*R. S. Sec.* 3471a, now *G. C.* 9193 *and* 9194.)

As we have heretofore shown, it is only under that statute that an easement or franchise to use the streets could be secured by The Cleveland, Southwestern Railway and Light Company or the Ohio Electric Power Company in July, 1924, or thereafter. The Cleveland, Southwestern Railway and Light Company and the Ohio Electric Power Company have no rights under *R. S. Sec* 3461, because both companies were incorporated after April 21, 1896.

The ordinance of July 1, 1924, was obviously passed by the City of Norwalk under the express grant of power contained in G. C. Sec. 3637 (see Appendix A, *infra*), and is in no way referable to *R. S. Sec.* 3461. It is not an agreement or an offer of any agreement. It is not a grant of easement. It is solely an unilateral act on the part of the City of Norwalk for the protection of human life and for the public welfare.

The Ohio Electric Power Company is subject to the provisions of this ordinance, whether it occupies the streets of the city under a perpetual franchise as claimed by petitioner, or at the mere sufferance of the city as claimed by the respondent. The city in either case has inherent power to enact the regulations contained in the ordinance and to enforce them against any companies or individuals maintaining wires carrying electric current.

In *Cincinnati vs. Diamond Light Co.*, 4 O. App. 177, (Motion to Certify Overruled, 12 O. L. R. 576), the light company claimed that a similar ordinance of the City of Cincinnati constituted a grant to it of the right to lay

conduits in the streets of the city. The Court of Appeals of Hamilton County denied such contention, saying at page 184:

> "Defendant also claims that the enactment by council of the general ordinance, No. 4285, providing general terms and conditions regulating the business of electrical illumination within its corporate limits, has in effect provided a general consent to all such companies and exhausts the subject of regulations and conditions, and that any company can, by observing the terms of such ordinance in all particulars, carry on such business with all necessary rights in the public highway. This ordinance is found as Section 647, on page 265 of the Code of Ordinances of Cincinnati (1910-1913), and also appears at page 407 of the Code of Franchises of the City of Cincinnati (1914). It lays down general provisions which shall be applicable to all such companies, and the first paragraph of the ordinance shows, in its terms, that it is not inteded to be a general grant to all companies, but simply states general provisions that shall apply to special grants. The opening paragraph is as follows:
>
> "'That whenever permission is by ordinance granted to any person, company or corporation to engage in the business of electrical illumination, it shall be under the following express terms and conditions.'
>
> "This ordinance would not prevent council, in making any particular grant, from imposing any other provisions and conditions not found therein in addition to or different from those of the ordinance. This ordinance can not be construed as granting a consent to the defendant company within the terms of the statute."

See also:

Laighton vs. City of Carthage, Mo., 175 F. 145.

7. All Rights of Petitioner's Predecessors in Title Became Terminated on the Expiration of the Public Lighting Agreement of April 13, 1905.

The contract of April 13, 1905, between the City of Norwalk and The Cleveland and Southwestern Traction Company (Ex. H, R. 541), terminated as of August 31, 1915 (the expiration date of such contract), any and all rights to occupy the streets of the City of Norwalk which The Incandescent Light & Power Company or any of its successors may have had.

This contract provided for the lighting of the streets of the city with arc lights, and the lighting of the public offices and buildings of the city with incandescent lights for ten years, beginning September 1, 1905. The electrical distribution system erected by The Norwalk Incandescent Light Company, and now operated by the Ohio Electric Power Company, was used for these purposes (Petitioner's Exhibit 1, R. 277). The contract contains detailed provisions as to the duties of the company and of the city. Section 14 of the contract provides as follows:

> "14. Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its said lamps, wires, poles and apparatus, but in such use of said streets, alleys, and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon said use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this con-

tract or prevent said contractor from carrying out the same, and provided further that nothing herein contained shall permit said use or occupation of said streets, alleys and other public places after the expiration of this contract, to-wit: August 31, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns hereunder, or from revoking the grant of said rights for non-user or misuser thereof through failure of said contractor or assigns to furnish such street, *commercial and residence lighting* to the said city, and *the residents and inhabitants thereof,* or otherwise.

"The said contractor, at the expiration of this contract, shall, upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents, and said contractor shall pay to said city all costs and expenses thereby incurred."

The contract uses the broadest language possible in stating the obligation of the company to remove its equipment from the streets upon its expiration. The express reference in the last lines of the first paragraph of Section 14 to the commercial and residence lighting service furnished the residents and inhabitants of the city shows clearly that the parties had in mind the entire distribution system of the company and not, as petitioner contends, merely the street lighting equipment. Commercial and residence lighting service is, also, dealt

with in Section 15 of this contract. There was only one system of poles which carried alternating current wires for incandescent lighting for both the city and private individuals, and direct current wires for the street lighting. (Ex. 1, R. 277; R. 57; 58.) Compliance with the provisions of the public lighting contract with regard to removal of equipment used by the company thereunder would require removal of the whole equipment of the company in the city.

The obligation of the company to remove its equipment from the streets was absolute and not merely an option to be exercised by the city within a reasonable time. The obligation is stated in positive language and the provision for request by the city is merely an express statement of the legal requirement that a tenant at sufferance is entitled to notice before he can be forced to vacate. The provision for thirty days' notice is inserted for the benefit of the company and has no effect upon the situation; except that after such notice and failure of the company to comply therewith, the city is authorized to remove the company's equipment and to charge to the company the cost of such removal. The resolution of March 23, 1926 (Petitioner's Exhibit 42, R. 445), requesting removal of the system of the Ohio Electric Power Company within thirty days, satisfies any requirement of notice under the public lighting contract.

This contract constitutes a recognition by the company that it had no rights to occupy the streets of the city with its equipment after August 31, 1915, and also constitutes a termination of any rights which it might have had thereafter. An express reference to the alleged perpetual franchise arising from the incorporation of

predecessor companies between 1887 and 1896 is not necessary to effect the waiver and cancellation thereof, in view of the broad and all inclusive language of Section 14. The provisions of Section 14 constitute a cancellation of such claim by novation, even if the company at that time were ignorant of the existence of a claim of a perpetual franchise.

In *Toronto Electric Light Co. vs. Toronto,* 33 Ont. L. R. 267, affirmed 1917, A. C. 84, similar public lighting contracts were held to make the light company a tenant at sufferance of the municipality after the expiration of the term thereof.

If The Cleveland and Southwestern Traction Company had any rights to occupy the streets at the time of entering into this contract, whether perpetual or limited in term, such rights became by this contract limited in term to August 31, 1915, and since the petitioner's claim of perpetual franchise is through The Cleveland and Southwestern Traction Company, it is bound by the agreement of that company to take all the poles, wires, and other apparatus and material of every kind and description from the streets, alleys, and other public places of the city upon the request of the city. The Court of Appeals of Huron County so held in *State ex rel. Martin vs. Ohio Electric Power Co.,* 35 O. App. 481. The Supreme Court of Ohio took the same position in *Ohio Electric Power Co. vs. State ex rel. Martin,* 121 O. S. 235. The court says at page 240:

> "That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited"

(referring to the street lighting contract of April, 1905, between the City of Norwalk and The Cleveland and Southwestern Traction Company) "and it could not thereafter convey something which it no longer possessed."

See also

Cleveland Electric Ry. Co. vs. City of Cleveland, 137 F. 111, 118.

The fact that The Cleveland, Southwestern and Columbus Railway Company, at or about the time of the expiration of this contract, sought a new franchise to use the streets of the city for its electrical distribution system is further evidence to support the foregoing construction of the contract of April 13, 1905. (R. 135, R. 136, R. 137, R. 201, 202.)

Petitioner urges that respondent is now estopped from asserting the provisions of the contract of April 13, 1905, as a defense to petitioner's claim of a perpetual franchise. This claim of estoppel is based upon the doctrine of *Railroad Company vs. McCarthy*, 96 U. S. 258, that where a party gives one reason for its conduct or decision, it cannot, after litigation is begun, change its ground and put its conduct upon another basis. It is claimed that, in ordering the Ohio Electric Power Company from its streets by resolution of March 23, 1926 (Petitioner's Exhibit 42, R. 445), and in requesting the prosecuting attorney of Huron County to bring proceedings to oust such company from the streets of the City of Norwalk by resolution of the city council of May 13, 1926 (Petitioner's Exhibit 45, R. 449), the city did not expressly rely upon the contract of April 13, 1905.

The grounds for ouster stated in the two resolutions are that the Ohio Electric Power Company had neither a city nor a state granted right to occupy the streets of the City of Norwalk. The city is now merely urging that one of the reasons why the Ohio Electric Power Company and the petitioner do not now have either a city or a state granted right to use the streets of the city is that their predecessor, The Cleveland and Southwestern Traction Company, entered into the contract of April 13, 1905. "Even in the law the whole generally includes its parts." (Mr. Justice Holmes in *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1, 53.)

Even if it should appear that there has been a shift of position by the city between 1926 and the present, the petitioner can show no prejudice to itself or to its bondholders. Petitioner rests its whole case upon the contention that its rights and the rights of its bondholders became fixed prior to the adoption of the resolutions referred to by petitioner's counsel. There has been no change of position by petitioner or Ohio Electric Power Company since March 23, 1926, the date of the council resolution in question. This case comes within the exception referred to in *Spitzer vs. Board of Trustees,* 267 F. 121, 128, that the doctrine of *Railroad Company vs. McCarthy* does not apply where there has been no prejudice by the failure of the adverse party to assert the defense in question at the time of the earlier statement of position.

D. The Respondent Is Not Estopped to Deny That Petitioner's Mortgagor, the Ohio Electric Power Company, Has a Continuing Right to Use Its Streets, Alleys, and Public Places

Petitioner contends that the City of Norwalk is estopped by its conduct to deny the existence of a continuing right in the Ohio Electric Power Company to occupy the streets, alleys, and public places of the city. This contention is apparently based upon the following:

1. The action of the city in allowing the construction of an electrical distribution system by The Norwalk Incandescent Light Company in 1890.

2. The action of the city in acquiescing in the construction of a new generating plant by The Northern Electric Company in 1895.

3. The action of the city in acquiescing in the continued operation of the electrical distribution system of The Norwalk Incandescent Light Company and the generating plant constructed by The Northern Electric Company and by their various successors, including the Ohio Electric Power Company.

4. The action of the officials of the City of Norwalk in enforcing the ordinance of July 1, 1924, as against The Cleveland, Southwestern Railway & Light Company and its successor, the Ohio Electric Power Company.

A review of the facts as to the conduct of the city is necessary.

1. Construction of Electrical Distribution System by The Norwalk Incandescent Light Company

The electrical distribution system now operated by the Ohio Electric Power Company was originally constructed between July and October, 1890, by The Norwalk Incandescent Light Company, the partnership. It was constructed under the ordinance of July 30, 1890 (Exhibit A, Second Amendment and Supplement to Bill of Complaint, R. 35), and the ordinance of October 7, 1890 (Exhibit B, Second Amendment and Supplement to Bill of Complaint, R. 36). These ordinances were enacted at the request of the partnership and the grant contained therein was accepted by the partnership. (R. 52, 53, 62.) They were limited in term to twenty years. The only possible claim of estoppel that can arise as the result of the action of the city in allowing the construction and the operation of the electrical distribution system of The Norwalk Incandescent Light Company is that the city is estopped to deny the validity of the easement granted by the ordinances. Such estoppel can create no rights after October 7, 1910, the date of expiration of the twenty-year term.

In *Cleveland vs. Railway Co.*, 93 F. 113 (C. C. N. D., Ohio, 1899)—(reversed on other grounds, 147 F. 171, C. C. A. 6th)—the fourth and fifth paragraphs of the syllabus read as follows:

> "4. Etoppel—Acts *in Pais*—Construction of Party's Conduct. The conduct of a party, sought to be made the basis of an estoppel against him, must be viewed in the light of the understanding he then had of his rights, and not in the light of such rights as they may be thereafter determined.

"5. Same—Acts of City. In 1849 the City of Cleveland entered into a contract with certain railroads, by which it granted them the right to use a portion of a tract of land claimed as a street. Not long afterwards, in a suit against the railroads by an adverse claimant, the defendants alleged their interest in the land to be that of licensees of the city, and successfully defended on the city's title under a prior dedication. Held, that the city, by permitting the railroads to remain in undisturbed, or even exclusive, possession of the ground for 45 years, and to expend large sums in the construction of improvements thereon without objection, was not estopped, as against them, to claim any rights in the property consistent with the contract, according to the construction and meaning given it by the defendants in their pleading in the former suit, where they had never given notice of any other or different claim."

(See also page 126 of the opinion for the identical language.)

2. Erection of Generating Plant in 1895

The Northern Electric Company erected a new generating plant in 1895. Some of the equipment used in the generating plant of The Norwalk Incandescent Light Company was moved to the new building and some new equipment was purchased. (R. 68.) This plant is now used by the Ohio Electric Power Company for standby or emergency service. The equipment placed in the plant in 1895 is still in use. (Iasull, R. 123.) The plant itself is now in a state of disrepair. (Ex. A, R. 521.)

On July 16, 1895, The Northern Electric Company and the City of Norwalk entered into a contract for public lighting. (Ex. G, R. 534.) In consideration of the agreement of the city to purchase street lighting and

lighting for the public buildings from the company, the company agreed in part as follows:

> "In further consideration of the premises, said company further covenants and agrees with said city that for the purpose of furnishing power and generating electricity for said arc and incandescent lights, it will build and construct in said city and during said period of ten (10) years will continuously keep in operation a first-class electric light plant, which shall consist of a brick and stone building of sufficient size and convenient construction, with a brick smoke-stack, to be equipped during all of said period with all the modern appliances for furnishing and maintaining good, regular, continuous and satisfactory lighting service; that said plant shall contain during all of said term of ten years, arc dynamos of a total capacity of at least one hundred and fifty regular electric arc lights, and boilers and engines of at least double the amount of power necessary to furnish electricity for and keep in operation all the arc lamps used in said city for such public lighting; and that all of the machinery contained in and about said plant and connected therewith shall be of the best and most improved pattern and kind and shall be kept in as good repair and condition as new, natural wear and tear excepted."

The generating plant constructed by The Northern Electric Company in 1895 was built in performance of the obligation of the company under the public lighting contract. It therefore is clear that no estoppel against the city can arise from the performance of the contractual obligation of the company.

3. Operation of Distribution System from October 7, 1910, to March 23, 1926

The electrical distribution system originally constructed by The Norwalk Incandescent Light Company was operated between October 7, 1910, the date of the expiration of the franchise ordinance of October 7, 1890, and March 23, 1926, the date of the resolution of the council of the City of Norwalk requesting the Ohio Electric Power Company to vacate the streets of the city of Norwalk (Petitioner's Exhibit 42, R. 445). During this period a number of companies were in possession of the system. The petitioner claims that large expenditures were made during this period.

(a) 1910-1915

The occupation of the streets of the city by the predecessors of the Ohio Electric Power Company between October 7, 1910, and September 1, 1915, is clearly referable to the public lighting contract between the city and The Cleveland and Southwestern Traction Company, which expired on the latter date. (Ex. H, R. 541.) As a practical matter, the City of Norwalk could not have forced the various companies operating the system during this period to vacate its streets, for the reason that under this contract the respective companies had the right to occupy the streets for public lighting purposes. It is to be remembered that there was only one system of poles supporting wires for incandescent lighting and for arc lighting. (Ex. 1, R. 277; R. 57, 58.) The incandescent lighting was furnished to both the city and pri-

vate individuals. (Ex. H, Section 13, R. 547.) The arc lighting was used only by the city.

The acquiescence of the city in the operation of the electrical distribution system now operated by the Ohio Electric Power Company during the period from October 7, 1910, to September 1, 1915, cannot be treated as an admission by the city that any perpetual rights existed and cannot be relied upon by the companies, in view of the fact that they were charged with notice by the express provisions of Section 14 of the contract of April 13, 1905 (Ex. H, R. 541), that the city considered the rights of the company to be at an end upon the expiration of such contract.

The conferences between the city officials and the representatives of The Cleveland, Southwestern & Columbus Railway Company, prior to the expiration of the public lighting contract, make it clear that the city took the position that the company was without right to occupy its streets after September 1, 1915. The evidence also shows that the company acquiesced in this position of the city. (R. 135, R. 36, R. 137, R. 201.)

(b) 1915-1926

The municipal electric light and power plant was constructed in 1915. The record shows that the city took no action to evict the distribution system of the private companies from its streets until March, 1926. On March 23, 1926, the city council passed a resolution ordering the Ohio Electric Power Company from the streets. The question arises whether under these circumstances an estoppel can be based upon the acquiescence of the city between September 1, 1915, and March 23, 1926, in the

continued occupation of its streets by the private distribution system. At the outset it is to be observed that during this period no claim of any franchise right, perpetual or otherwise, was ever made by any of the companies occupying the streets of the city; nor was any affirmative action taken by the city suggesting a recognition of any franchise rights. The case is one of complete inaction and silence by both parties.

There is no evidence in the record in this case of any expenditures, either for repairs or for extensions to the private distribution system, between September 1, 1915, and March 23, 1926. Mr. Taylor testified that during the period that he was identified with the company, from 1910 to 1916, the company spent between twenty and twenty-five thousand dollars in repairs and replacements. The whole burden of his testimony would indicate that the property was in a very bad state of repair when he came to Norwalk in 1910; and that it was at that time immediately necessary to make repairs so that the property could be operated with reasonable efficiency and economy and so that the company then operating the property could fulfill the obligations of its public lighting contract with the city. (R. 77, 78.) The evidence bearing upon the breakdown of the private lighting system during this period supports this inference. (R. 202, R. 137, R. 192, 193.) Mr. Taylor made no statement concerning expenditures after September 1, 1915. Mr. Taylor's connection with the property extends to 1916, although he was not in active charge after 1913. (R. 77, 78.) Petitioner did not offer any evidence allocating the expenditures made during Mr. Taylor's connection with the property, and his testimony therefore does not support a

claim of any expenditures upon the property after September 1, 1915.

The only other evidence as to the amount of expenditures upon the property is that of Mr. Turkle, who managed it from 1925 to 1928. He testified that in his opinion the company spent, during that period, between eighteen and twenty thousand dollars on maintenance and repairs (R. 99, 94). There is no showing anywhere in the record of any expenditure prior to March 23, 1926, when the city unequivocally declared its position. The burden being upon the petitioner in this regard, the petitioner has failed to prove its case.

The main expenditure upon the property during Mr. Turkle's management was the rebuilding of the company's line on Main Street in the City of Norwalk. This occurred in 1927 while the *quo warranto* suit was pending, and over the vigorous protest of the Director of Public Works of the city. (R. 96, 99; Ex. 64, R. 467.)

The evidence bearing upon expenditures between 1910 and 1916 and between 1925 and 1928 fails to show that anything more than ordinary maintenance and repairs were made, with the possible exception of the rebuilding of the line on Main Street which took place after the city had declared its position. The Ohio Electric Power Company representatives at the time claimed that it was merely a repair operation. Such maintenance and repair work was necessary to keep the private distribution system operative. There is no evidence of any capital investment between 1910 and 1928.

It is scarcely controversial under the evidence that the electrical distribution system which the Ohio Electric Power Company is now operating in the streets of the

City of Norwalk is in a sad state of disrepair. (Spengler, R. 171; R. 151-153; Exs. K, O, R. 554-558.) Far from being a modern and efficient system, it is a menace to the safety of the citizens of Norwalk.

The present condition of the system establishes that no great expenditures have been made upon it to the prejudice of the Ohio Electric Power Company. The equipment in the generating plant dates back to 1890 and 1895. (Compare description of machinery in original plant in Ex. 5, R. 287, with description of machinery in present plant, Exhibit D, R. 525; see also Insull, R. 122, 123.)

4. The Conduct of the City Under the Ordinance of July 1, 1924

On July 1, 1924, the City of Norwalk enacted an ordinance relating to the construction and maintenance of electric light and power wires (Ex. 38, R. 438). This ordinance affected all companies operating wires carrying electricity within the city. The plaintiff contends that by enforcing this ordinance against the Ohio Electric Power Company, the city is estopped to claim that such company does not have a continuing right to operate in the streets of the city. We submit that this ordinance, which was passed under the general police powers of the city, was properly enforced against any individual or company operating in the city whether the company was operating under a franchise or was using the streets of the city at the sufferance of the city. The fact that the Ohio Electric Power Company has no right to use the city streets does not give it a permissive right to endanger the lives and safety of the citizens of the city.

The first order made by any representative of the City of Norwalk under this ordinance is Exhibit 51, a letter dated May 14, 1925. (R. 457.) The last act of the city under the ordinance prior to the resolution of March 23, 1926 (requesting the Ohio Electric Power Company to remove its equipment from the streets of Norwalk), is contained in Exhibit 60, a letter of November 19, 1925. (R. 464.) Exhibits 51 to 60, inclusive, show that the only action of the city under this ordinance, so far as the Ohio Electric Power Company was concerned, was to order the removal of certain unused wires of the Ohio Electric Power Company. Orders to remove do not constitute an admission of a continuing right to use the streets.

5. Assessment of Taxes

Petitioner at page 88 of its brief contends that the assessment of taxes upon the property of Ohio Electric Power Company and its predecessor furnishes a basis for an estoppel against respondent. The taxes in question were real and personal property taxes, not franchise taxes. (Exhibit 1, R, 279.) Such taxes would be assessable and payable regardless of whether the utility had any continuing easement in the streets of respondent. Such taxes were assessed by the Tax Commission of Ohio upon the basis of a report made by the company. (See Physical Exhibit C.) The respondent had nothing to do with the assessment of such taxes and had no standing to object to such assessment. Clearly there has been no inconsistent action with respect to taxes which can furnish any basis for estoppel against respondent.

6. Authorities on Estoppel

In summary, an estoppel *in pais* can only arise where the conduct of the party against whom the estoppel is asserted is tantamount to fraud, or where its action or silence induced the other party to act to his prejudice or injury. The City of Norwalk has at no time by its conduct led The Norwalk Incandescent Light Company or any of its successors, including the Ohio Electric Power Company, to believe that they, or any of them, had any continuing right to occupy the streets of the city after September 1, 1915. No such claim of continuing right was ever made by the Ohio Electric Power Company or any of its predecessors prior to the filing of the answer in the *quo warranto* suit. The petitioner has not shown that the Ohio Electric Power Company or any of its predecessors predicated such expenditures as were made upon an admission of the city, by silence or otherwise, that the companies had a continuing right to occupy its streets.

The Supreme Court of Ohio and the Court of Appeals have expressly held that no estoppel can be asserted against the city under the facts of the present case. The only evidence before this court which was not before the state courts is the ordinance of July 1, 1924, and the action of the city thereunder. We submit that such evidence has no bearing upon the question of estoppel. The Supreme Court of Ohio said in *Ohio Electric Power Co. vs. State ex rel. Martin,* 121 O. S. 235:

> "Mere acquiescence in the continued unauthorized occupancy of the streets, or non-action on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of

ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding."

The mere fact that the successors of The Norwalk Incandescent Light Company continued to occupy the streets, after the expiration of the franchise, without any understanding or agreement with the city, can create no new rights, particularly in view of the fact that the longer the city permitted the utility to transact business, the greater was the advantage to the utility.

In *Toronto Electric Light Co., Ltd., vs. Toronto*, 1917 A. C. 84, affirming 33 *Ont. L. R.* 267 (cited *supra*, p. 94), the electric light company had maintained its electrical distribution system in the streets of Toronto for over forty years without interference by the city. The company claimed that the acquiescence of the city in such continued occupation of the streets, estopped the city from denying that the company had a continuing right to operate therein. Injunction against removal of poles, etc., by the city was denied. Lord Atkinson, giving the judgment of the Privy Council, says at page 99:

> "No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights. It may well be that the appellant company never anticipated that the respondents would insist upon the removal of posts carrying wires, erected with their implied consent but not in pursuance of any formal agreement. With the hardships (if any) or the moralities of the case this board has no concern. It deals with the legal rights of the parties and those alone, and, having regard solely to them, their lordships are on the whole case of opinion that the judgment appealed from was right and should be affirmed and this appeal be dismissed, and they will humbly advise His Majesty accordingly. * * *"

Chief Justice Meredith of the Appellate Division of the Supreme Court of Ontario says in 33 *Ont. L. Rep.* 267, at page 284:

> "Now, in order to raise an estoppel the person who sets it up must have been mistaken as to his own legal rights and must have expended money or done some act on the faith of his mistaken belief; and the person against whom the estoppel is set up must have known of his own rights and of the other person's mistaken belief, and must have encouraged him in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: Halsbury's Laws of England, Vol. 13, p. 167, para. 201."

Louisville Trust Co. vs. Cincinnati, 76 F. 296, 316 (C. C. A. 6th, 1896);

City of Detroit vs. Detroit City Railway Co., 60 F. 161, 166 (C. C. Mich.—Opinion by Taft, Circuit Judge—1894).

In a very similar case to the one at bar, *Selkirk vs. Selkirk Electric Light Co.,* 20 Manitoba Rep. 461, the court said as to the claim of the utility company that the town was estopped from denying the rights of the utility company in the streets of the town (p. 469):

> "The company cannot complain if the town has permitted them to continue for a number of years after its rights had ceased; the longer they were permitted to transact business, the greater the advantage to them; and no expenditure of any magnitude has been made by the company and none of a stable or permanent character or other than necessary for its requirements in carrying on its business."

In *Milwaukee vs. Milwaukee Electric Railway & Light Co. et al.*, 173 Wis. 400, 180 N. W. 339, it was held:

> "The fact that it" (an interurban street railway company) "has for a considerable period of time, upwards of twenty years, the court found, acquiesced in such use" (use of the city's streets without franchise from the city) "does not estop it" (the city) "from now asserting its claim. * * * The use of the streets by the defendant without a franchise where one is needed constitutes a continuing trespass. As against the city in its governmental capacity or as against the public, the continuing trespass, if any, has not ripened into a right."

In *Laighton vs. City of Carthage, Mo.*, 175 F. 145, the court held that continued operation by the company after the expiration of its franchise did not give rise to an obligation upon the company to continue to serve. Upon this point, the court says at page 149:

> "As this postulate is conditioned upon the implied continued contractual relation, as in the case of a mere license, either party may at will withdraw therefrom and put an end to it. Were the law otherwise, it would be in the power of a mere licensee to perpetuate indefinitely an expired franchise, and it would be in the power of the grantor to compel continued service indefinitely from one under no contractual obligation to render service."

In the cases cited by petitioner to support its claim of estoppel, the municipal corporations were fully familiar with the claims of the utilities. In each case, there were large investments made by the utility on the basis of such claim of franchise right. Neither a continuing claim of franchise right brought to the attention of the respondent nor large expenditures in capital im-

provements based thereon have been shown in the present case. The facts here furnish no basis for the estoppel urged by the petitioner and bring this case clearly within the authorities denying such an estoppel cited above.

CONCLUSION

We respectfully submit:

1. That the Circuit Court of Appeals properly held that the record showed no circumstances justifying equitable interference with the state court *quo warranto* proceedings.

2. That Petitioner has no continuing right to have its Mortgagor, Ohio Electric Power Company, occupy the streets of Respondent City.

The decision of the Circuit Court of Appeals should, therefore, be affirmed.

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APPENDIX A

Statutes of Ohio

1. Collection of Statutes of Ohio Relating to Public Utility Easements in the Streets of Municipal Corporations

The first general incorporation act in Ohio was passed May 1, 1852. We quote only those portions thereof relating to easements in the streets of municipal corporations:

Act of May 1, 1852, 50 O. L. 274

"AN ACT
To provide for the creation and regulation of incorporated companies in the State of Ohio

WHO MAY BECOME A BODY CORPORATE

"Sec. I. Be it enacted by the General Assembly of the State of Ohio, that any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges and powers conferred by, and subject to all the restrictions of this act.

"TO CREATE AND REGULATE RAILROAD COMPANIES

" * * *

OCCUPATION OF STREETS, PUBLIC GROUNDS, ETC.

"Sec. XII." (R. S. 1880, Sec. 3283.) "If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way, or ground of any kind, or any part thereof, it shall be competent for the municipal or other

corporation or public officer or public authorities, owning or having in charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act: Provided, that every railroad company laying down any such track or tracks, upon any such public street, road, alley or other public ground, shall be responsible for injuries done to private property by such location, lying upon or near to such public ground, which may be recovered by civil action brought by the owner or owners, at any time within two years from the completion of such track or tracks, before the proper court." (Amended April 15, 1857, 54 *O. L.* 133, by addition of proviso.) (For present analogous provisions, see G. C., Sections 8763-8766.)

* * *

"TO CREATE AND REGULATE MAGNETIC TELEGRAPHIC COMPANIES

How Telegraphic Corporations May Be Created

"Sec. XLIV. That whenever any number of persons, as required by the first section of this act, associating to form a company, for the purpose of constructing any line or lines of magnetic telegraph, they shall, under their hands and seals, make a certificate, which they shall specify as follows: First, the name assumed by such company and by which it shall be known; second, the ter-

mini of said line or lines, and the counties through which the same shall pass; third, the amount of capital stock necessary to construct said line or lines of telegraph, and the amount of each share; such certificate shall be acknowledged, certified, and forwarded to the secretary of state, recorded and copied in the same manner as provided in the second section of this act for the incorporation of railroad companies; and when so incorporated, are hereby authorized to construct a line or lines of magnetic telegraph, as may be named in their certificate of incorporation, and by the name and style provided in said certificate shall be deemed a body corporate, with succession, and they and their associates to have the same general powers, as is provided in the third section of this act, and shall be subject to all the restrictions hereafter provided.

" * * *

APPROPRIATION OF ROAD

"Sec. XLVII." (R. S. 3454.) "The corporation hereby created, is authorized to construct said telegraph line or lines, from point to point, along and upon any of the public roads, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires: Provided, that the same shall not incommode the public in the use of said roads or highways." (For present analogous provision see G. C. Sec. 9170.)

* * *

"TO CREATE AND REGULATE GAS LIGHT AND WATER COMPANIES

" * * *

POWERS OF GAS COMPANIES

"Sec. LIII. Any corporations formed under this act shall have full powers, if a gas company, to manufacture and sell, and to furnish such quan-

tities of gas or water as may be required in the city, town or village where located, for public and private buildings, or for other purposes; and such corporation shall have power to lay conductors, for conducting water or gas through the streets, lands, alleys and squares, in such city, town or village, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations as they may prescribe." (For analogous sections, see R. S. 3550, G. C. 9320.)

CORPORATIONS MAY CONTRACT FOR GAS OR WATER

"Sec. LIV. The municipal authorities of any city, town or village, in which any gas light or water company shall be organized under this act, are hereby authorized to contract with any such corporation, for the lighting or supplying with water, the streets, lands, lanes, squares and public places in any such city, town or village."

The first Ohio statute relating expressly to street railway easements was passed April 10, 1861. It provided in part as follows:

Act of April 10, 1861, 58 O. L. 66

"AN ACT

To provide for and regulate street railroad companies.

THE CERTIFICATE OF ASSOCIATION

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that any number of natural persons, not less than five, associating to form a company for the purpose of constructing a street railroad, and become incorporated under this act, shall, under their hands and seals, make a certificate, which shall specify as follows: 1.

The name assumed by such company, and by which it shall be known. 2. The name of the street, alley, or avenue, with a description of the locality thereon of each terminus of said road, and the names of the streets, alleys, and avenues or other public grounds, through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificate shall be acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and shall be forwarded to the secretary of state, who shall record and carefully preserve the same in his office; and a copy thereof, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such company.

GENERAL GRANT OF POWERS

"Sec. 2. That when the foregoing provisions have been complied with, the persons named as corporators in said certificate, and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects named in said certificate, in accordance with the provisions of this act; to make and use a common seal, and the same to renew or alter at pleasure—and do all needful acts to carry into effect the object of the incorporation. Such corporation shall be authorized to construct, operate and maintain a street railroad, with single or double track on the streets, alleys, or avenues, or other public ground specified in the certificate, with such sidetracks, turn-outs, offices, buildings and depots as they may deem necessary, between the points of

termini named in the certificate, and transport thereon passengers and their packages and baggage.

"* * *

CONSENT OF CORPORATE AUTHORITIES OF CITY TO BE OBTAINED

"Sec. 5. That hereafter, no street railroad shall be constructed or commenced until the consent of the city council or corporate authorities of the city, town or village wherein such road is to be constructed shall have been first obtained; and it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railroad company, organized in pursuance of this act, or with any individual or company of individuals, desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals, shall construct and operate a street railroad in such city, town or village: Provided, that no grant to occupy any street, lane or avenue, or public ground in any city of the first class, containing a population exceeding eighty thousand inhabitants, shall be made, except in accordance with sections fifteen and sixteen of an act passed March 3, 1860, relating to cities of the first class, having a population exceeding eighty thousand inhabitants.

"* * *"

The above act, slightly changed, became *R. S., Sections* 3437-3443 (see *G. C.* 9100-9113.)

Act of March 31, 1865, 62 O. L. 72

"AN ACT

Supplementary to the act entitled 'an act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1852.

SURVEYS AND APPROPRIATION OF TELEGRAPH LINES

"Section I." (R. S. 3456, 3457.) "*Be it enacted by the General Assembly of the State of Ohio,* That any magnetic telegraph company heretofore incorporated, or that may hereafter be incorporated, under any law of this state, is authorized to enter upon any land, whether held by any individual, or by any corporation, and whether acquired by purchase or by an appropriation thereof in virtue of any law of this state, or in virtue of any provision in the charter of such corporation, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph; and may appropriate so much of such land as may be deemed necessary for the erection and maintenace of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and for the right of way over said lands and adjacent lands, sufficient to enable said magnetic telegraph company to construct and repair said lines of magnetic telegraph. No magnetic telegraph company incorporated under any law of this state, shall be authorized, without the consent of the owner in writing, to enter any dwelling, warehouse, barn, or any building connected with either of them, or any other edifice erected for any agricultural, commercial, manufacturing, religious, educational, or scientific purpose, or any railroad depot, station, tool-house, engine-house, or warehouse, or to use or appropriate any part

thereof; nor to erect any telegraph pole, pier, or abutement in any yard, or inclosure within which any such edifice may be situated, nor, in cases not provided for in section five of this act, to erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any such edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment should be overthrown; nor shall such company be authorized to injure or destroy any fruit or ornamental trees." (For present analogous section see G. C. 9172, 9173.)

SAME

"Sec. II." (R. S. 3458.) "Where the lands sought to be appropriated for lines of magnetic telegraph are held by any railroad, turnpike, canal, bridge, or avenue company, or by any other corporation, incorporated under any law of this state, whether held by purchase or in virtue of any appropriation authorized by their charter, or by any law of this state, the right of the magnetic telegraph company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which such corporations may be authorized to put such lands, under their respective charters; nor shall any magnetic telegraph company be authorized to erect their poles, piers, abutments, wires, and other necessary fixtures in such close proximity to any other line of magnetic telegraph, authorized by law to be constructed, as to interfere mechanically with the practical working of such telegraph." (For present analogous section see G. C. 9174.)

SAME

"Sec. III." (R. S. 3459.) "The right of the magnetic telegraph company to use lands held by any railroad company, for the permanent struc-

tures of the telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of such railroad company, wherever it is practical to erect the line within those limits. The statement, in all cases where the applicants seek to appropriate lands that lie beyond those limits, shall state the facts showing such impracticability, and shall designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the exact spot where such magnetic telegraph company seeks to establish the line; and the probate court shall, in all instances, determine, if it is controverted by the railroad company, whether the erection of the line at the points designated will, in any material degree, interfere with the practical uses to which such railroad may be authorized to put such land; and if the court shall be satisfied that it will so interfere, they shall reject the application, or require the structure to be erected at such other point as the court shall direct; provided, that nothing in this act shall be so construed as to authorize any telegraph company to condemn the use of the track or rolling stock of any road, for the purpose of transporting poles, materials, or employees of such telegraph company, or for any other purpose whatever." (For present analogous sections see G. C. 9175, 9176.)

SAME

"Sec. IV." (R. S. 3460.) "Proceedings to appropriate lands to the use of any magnetic telegraph company instituted under the act to provide compensation to owners of private property, appropriated to the use of corporations, passed April 30, 1852, against any defendant whose adjoining or continuous lands lie in more than one county, may be instituted in any county in which any part of said lands may lie, and the damages shall be assessed, in one proceeding, in respect of all such

lands of the defendant sought to be appropriated, whether lying in the county wherein the court is sitting or in other counties." (For present analogous section see G. C. 9177.)

How Telegraph May Be Constructed Through Any City or Village

"Sec. V." (R. S. 3461.) "When any lands authorized by this act, and the act to which this is supplementary, to be appropriated to the use of any magnetic telegraph company, are subject to the easement of any street, alley, public way, or other like public use, within the limits of any city or incorporated village, the mode of use shall be such as shall be agreed upon between the municipal authorities of such city or incorporated village and the magnetic telegraph company, and in case they can not agree, or in case the municipal authorities unreasonably delay to enter into any agreement, then the probate court of the proper county, in a proceeding instituted for that purpose, shall direct in what mode such magnetic telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of such street, alley, and public way. Nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of any street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." (For present analogous sections see G. C. 9178, 9179.)

Who May Construct or Own Lines

"Sec. VI." (R. S. 3455.) "Any magnetic telegraph company incorporated under the laws of this state, may construct, own, use and maintain any line or lines of magnetic telegraph, whether described in their original certificate of organization

or not, and whether such line or lines be wholly within, or partly beyond the limits of this state, or may join with any other corporation or association in conducting, leasing, owning, using or maintaining such line or lines, upon such terms as may be agreed upon between the directors or managers of the respective corporations, and such magnetic telegraph companies may own and hold any interest in such line or lines, or may become lessees of such line or lines, upon such terms as may be agreed on." (For present analogous section see G. C. 9171.)

PENALTY FOR DESTROYING POSTS, PIERS, ETC.

"Sec. VII. Any person who shall unlawfully and intentionally injure, molest, or destroy any of the lines, posts, piers, abutments, or other material or property pertaining to any line of magnetic telegraph, erected in this state, shall upon indictment in the Court of Common Pleas of the proper county, and on conviction thereof, be deemed guilty of a misdemeanor, and be punished by fine not exceeding five hundred dollars, or imprisonment in the penitentiary not exceeding one year, or both, at the discretion of the court having cognizance thereof.

DUTY OF COMPANY IN SENDING DISPATCHES

"Sec. VIII." (R. S. 3462, 3463, 3464.) "It shall be the duty of every telegraph company, incorporated or unincorporated, operating any telegraph line in this state, to receive dispatches from and for other telegraph lines not being parallel to or doing business in competition with the line over which the dispatch is required to be sent, and from or for any individual, and on payment of their usual charges for transmitting dispatches as established by the rules and regulations of such telegraph line, to transmit the same with impar-

tiality and good faith under a penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit by civil action, in the name and for the benefit of the person or persons or company, sending or desiring to send such dispatch. Where the person sending the dispatch desires to have it forwarded over the lines of other telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and shall tender to the first company the amount of the usual charges for the dispatch to the place of final delivery, it shall be the duty of the company to receive the same, and, without delaying the dispatch, to pay to the succeeding line the necessary charges for the remaining distance; and it shall be the duty of the succeeding line or lines to accept the same, and forward the dispatch in the same manner as if the sender had applied to them in person, and paid them their usual charges; and for omitting so to do, they shall severally be liable to a like penalty. In all cases where application is made to any such telegraph company to send a dispatch, it shall be the duty of the officer, agent, clerk or servant, appointed by such company to receive dispatches at that station, plainly to inform the applicant, and if required by him to write upon the dispatch that the line is not in working order, or that the dispatches already on hand for transmission will occupy the time so that the dispatch offered can not be transmitted within the time required if the facts are so; and for omitting to do so, or for intentionally giving false information to the applicant in relation to the time within which the dispatch offered may be sent, such officer, clerk, agent or servant, and the company by which he is employed shall incur the same penalty." (For present analogous section see G. C. 9182-9184.)

NEWSPAPERS AND PUBLIC OFFICERS TO HAVE THE PREFERENCE IN CERTAIN CASES

"Sec. IX." (R. S. 3465.) "It shall be the duty of every telegraph company, incorporated or unincorporated, operating any telegraph line in this state, to transmit and deliver all dispatches in the order in which they are received for transmission or delivery under the like penalty of one hundred dollars, as provided in Section Eight; provided, however, that arrangements may be made with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its regular order; and provided, also, that dispatches by public officers of the state, or the United States, on public business, may have preference over all private business when the public interest requires such preference; and, provided, also, that no such company shall be required to deliver dispatches at a greater distance from the station at which they are received than the published regulations of such company require the company to deliver them. If the applicant direct the dispatch to be mailed at the place of delivery, and offer to pay the necessary postage thereon, such telegraph company shall affix the necessary postage stamp, and mail the dispatch in time for the first mail that shall depart for the place of final destination, within a reasonable time after such dispatch shall have been received at the office of delivery; and for the omission so to do, such company shall be liable to a like penalty as provided in Section Eight." (For present analogous section, see G. C. 9185.)

PENALTY FOR DIVULGING CONTENTS OF DISPATCH

"Sec. X." (R. S. 3466.) "Any person connected with any telegraph company, incorporated or unincorporated, operating a line of telegraph in this state, either as manager, clerk, operator,

messenger, or in any other capacity, who shall wilfully divulge the contents, or the nature of the contents of any private communication intrusted to him for transmission or delivery, or who shall wilfully refuse or neglect to transmit or deliver the same, or shall wilfully delay the transmission or delivery of the same, with a view to injure the sender or intended receiver, or to benefit himself or any other person, shall, on conviction thereof in the Court of Common Pleas of the proper county, be adjudged guilty of a misdemeanor, and shall suffer imprisonment in the county jail for a term not exceeding three months, or shall pay a fine not exceeding five hundred dollars, in the discretion of the court." (For present analogous section, see G. C. 13388.)

PENALTY FOR TRANSMITTING FALSE INTELLIGENCE

"Sec. XI." (R. S. 3467.) "If any agent, officer, or manager of any telegraph line operating in this state, or any other person, shall knowingly transmit by such telegraph line any false communication or intelligence, with intent to injure any one, or to speculate in any article of merchandise, commerce or trade, or with intent that another may do so, or shall knowingly send or deliver any dispatch that is forged, or not authorized by the person whose name purports to be signed thereto, shall, on conviction thereof in the Court of Common Pleas of the proper county, be liable for the same penalty as is provided in Section Ten of this act." (For present analogous section, see G. C. 9186.)

COMPANY MAY REMOVE POLES, PIERS, ETC., AND APPROPRIATE OTHER LANDS, IN CERTAIN CASES

"Sec. XII." (R. S. 3468.) "If at any time, after the erection of any line of magnetic telegraph upon lands held by any corporation, such

corporation shall have occasion to use the land upon which any telegraph pole, pier, abutment, or other fixture, has been erected, by virtue of the power given in this act, for any of the purposes authorized by their charter, it shall be the duty of such telegraph company to remove such pole, pier, abutment, or fixture, to such convenient place as may be designated by the corporation requiring the use of the ground, upon reasonable notice given in writing, and to erect the pole, pier, abutment, or fixture, in such new place, so as not to interfere with the practical uses to which such corporation may be authorized to put such land. If it be impracticable to erect a line of magnetic telegraph upon the lands of such corporation, in consequence of the uses to which such corporation may put the lands, the telegraph company are hereby authorized to appropriate adjoining lands, by a new proceeding for that purpose." (For present analogous sections, see G. C. 9187, 9188.)

COMPANY MUST REPAIR DECAYED OR DEFECTIVE WORKS

"Sec. XIII." (R. S. 3469.) "If at any time, after the erection of such magnetic telegraph line, on the lands of any corporation, such corporation shall apprehend danger, or risk of danger, to the works or practical operations of such corporation, in consequence of any decay or defect in the mode of structure of any of the works of such magnetic telegraph company, they may require the telegraph company, upon five days' notice in writing, to repair such decayed or defective works; or, in case the danger is imminent, so as not to admit of delay, such corporation may, without notice, repair such defect and recover the expenses thereof, with costs of suit, before any court of competent jurisdiction." (For present analogous section, see G. C. 9189.)

"Sec. XIV. This act shall take effect from its passage."

Section XII of the Act of May 1, 1852, became Section 3283 of the Official Revised Statutes of 1880. Section XLVII of the Act of May 1, 1852, *supra*, became Section 3454 of the Revised Statutes of 1880. Sections I to XIII of the Act of March 31, 1865, *supra*, are found in Sections 3455 to 3469 of the Revised Statutes of 1880, with some change in the order.

The Revised Statutes of 1880 contain the following section relating to the use of streets by gas and water companies:

POWERS OF GAS AND WATER COMPANIES

"Sec. 3550. A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town, or township, may manufacture, sell, and furnish the gas required therein for such or other purposes, and a company organized for the purpose of supplying the inhabitants of a city village, town, or township with water may sell and furnish any quantity of water required therein for such or other purposes; and such companies may lay conductors for conducting gas or water through the streets, lands, alleys, and squares in such city, village, town, or township, with the consent of the municipal authorities of the city, village, or town, or with the consent of the trustees of the township, and under such reasonable regulations as they may prescribe. (64 v. 255, Sec. 53.)"

Act of May 12, 1886, 83 O. L. 143

"AN ACT

"To authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a waterproof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

"Section 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands, lanes, squares and public places in such city, village or town.

"Section 3. This act shall take effect and be in force from and after its passage.

* * * * *

"Passed May 12, 1886."

(See G. C. 9195.)

Act of January 26, 1887, 84 O. L. 7

"AN ACT

"To supplement sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that the following section shall constitute a section supplementary to sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio, with sectional numbering as follows:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.

"Section 2. This act shall take effect and be in force from and after its passage.

"Passed January 26, 1887."

Act of April 21, 1896, 92 O. L. 204

"AN ACT

"To amend section 3471a of the Revised Statutes of Ohio.

MAGNETIC TELEGRAPH COMPANIES

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That section 3471a, as enacted January 26, 1887 (84 O. L. 7), be and the said section hereby is amended so as to read as follows:

Laws Applicable to Electric Light and Power and Automatic Package Carrier Companies

Municipal Consent; Penalty for Violation; Application of Act, Etc.

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunc-

tion or otherwise; and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any circuit court of the state.

REPEALS, ETC.

"Section 2. That said section 3471a shall be and the same hereby is repealed; and this act shall take effect and be in force from and after its passage.

* * * * *

"Passed April 21, 1896."
(See G. C. 9192, 9193, 9194.)

2. Collections of Statutes Relating to the Powers of Municipalities Over Streets

In 1890 the following statutes relating to the powers of municipalities over their streets were in effect:

R. S. Section 2640

COUNCIL TO HAVE CONTROL OF STREETS, ETC.

"Sec. 2640. The council shall have the care, supervision, and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance. (66 v. 222, Sec. 439.)"

R. S. Section 1692

"Section 1692. In addition to the powers specifically granted in this title, and subject to the

exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same.

"* * *

STREETS

"18. To lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and to light streets, alleys, public grounds and buildings, wharves, landing places, bridges, and market spaces within the corporation, including any portion of any turnpike or plank road therein surrendered to or condemned by the corporation, and to provide for laying down gas pipes.

"* * *"

3. Collection of Statutes Relating to Control of Electric Light Companies by Municipalities

In 1890 the following statutes relating to control of electric light companies by municipalities were in effect:

R. S. Section 2478

REGULATING PRICE OF ELECTRIC LIGHT, ARTIFICIAL AND NATURAL GAS

"Sec. 2478. The council of any city or village in which electric lighting companies, natural or artificial gas companies, or gas light or coke companies may be established, or into which their wires, mains or pipes may be conducted, are hereby empowered to regulate, from time to time, the price which said electric lighting, natural or artificial gas, or gas and coke companies may charge for electric light or for gas for lighting or fuel purposes, furnished by such companies to the citizens, public grounds and buildings, streets, lanes,

alleys, avenues, wharves and landing places; and such electric lighting, natural or artificial gas, or gas-light and coke companies shall, in no event, charge more for any electric light, or natural or artificial gas furnished to such corporation or individuals than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for rent of their meters. (March 1, 1889: 86 v. 63.)"

R. S. Section 2491

CONTRACT TO SUPPLY MUNICIPALITY WITH ELECTRIC LIGHT OR GAS

"Sec. 2491. A municipal corporation may contract with such company for supplying with electric light, natural or artificial gas for the purpose of lighting (or heating) the streets, squares and other public places and buildings in the corporation limits; but this section shall be subject to the restrictions in the last clause of Section Thirty-five Hundred and Fifty-one. (March 1, 1889; 86 v. 63.)"

R. S. Section 2492

PROVISION FOR LIGHTING STREETS, ETC.

"Section 2492. The council of any city or village may provide for lighting the streets, alleys, public grounds and buildings, wharves, landing places, bridges, railways, and market spaces within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation. (69 v. 47, Sec. 428; 72 v. 107, Sec. 199.)"

4. Provisions of General Code of Ohio Relating to Powers of Municipalities Over Streets

Among the provisions of the *General Code of Ohio* now in effect relating to the powers of municipalities over streets, are the following:

"Sec. 3616. **Powers of ordinance or resolution.** All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them. (99 v. 5, Sec. 7; 96 v. 26, Sec. 8.)"

"Sec. 3629. **Establish and care for streets.** To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation. (99 v. 7, Sec. 7r.)"

"Sec. 3637. **Erection of fences, signs; construction and repair of wires, poles, plants; licensing house movers, electrical contractors, plumbers, etc.** To regulate the erection of fences, billboards, signs and other structures, within the corporate limits, and to provide for the removal and repair of, insecure billboards, signs and other structures; to regulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity; to provide for the licensing of house movers, electrical contractors, plumbers, and sewer tappers and vault cleaners. (103 v. 93, 99 v. 6, Sec. 7m.)"

"Sec. 3714. **Council to have care, supervision and control.** Municipal corporations shall have

special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance. (96 v. 26, Sec. 9; 96 v. 31, Sec. 28.)"

APPENDIX B

Opinions of Court of Appeals of Huron County, Ohio, and Supreme Court of Ohio in Quo Warranto Case

1. State, ex rel. Martin, vs. The Ohio Electric Power Co., 35 Ohio App. 481

Municipal corporations—Written acceptance of ordinance granting partnership use of streets, unnecessary—Incorporation of public service company sufficient acceptance, when—Statutes granting electric companies street privileges contemplate incorporated companies only—Sections 9170, 9178, 9179, 9191, 9192, 9193; *and* 9194, *General Code—Rights greater than given by ordinance cannot be claimed by assignee, when—Estoppel not created by use after franchise ordinance expired.*

1. Where ordinance of municipality granting partnership a franchise to furnish electricity was silent as to manner of acceptance thereof, but partnership thereafter installed the necessary equipment and furnished and distributed electricity in municipality until incorporation of company by members of partnership to take over and conduct its business, to which all of the partnership property was transferred, the corporation thereafter continuing to furnish and distribute electricity as had the partnership theretofore, formal acceptance of the ordinance was not necessary.

2. Statutes granting privileges in streets to electric companies did not contemplate partnerships or individuals, but only incorporated companies.

3. Electric company, as assignee of partnership, having relied solely on ordinance granting to partnership, its successors and assigns, use of streets for a definite period, could not after expiration thereof, claim to possess any greater rights than the ordinance gave.

4. The continued use by the defendant of the streets and the furnishing and distribution of electricity within the municipality, after the expiration of the franchise granted by the ordinance, without further acquiring the right to do so in the manner provided by law, did not create an estoppel against the municipality in favor of the defendant.

(Decided May 21, 1928.)

In *Quo Warranto.*

Mr. Edgar G. Martin, prosecuting attorney, M. G. Ray Craig and Mr. Charles Suhr, for plaintiff.

Messrs. Fauver & Fauver and Mr. W. R. Pruner, for defendant.

Lloyd, J. This is an action in *quo warranto,* whereby the plaintiff, the State of Ohio, on relation of Edgar G. Martin, prosecuting attorney of Huron County, seeks to oust the defendant, The Ohio Electric Power Company, from using the public streets, lanes, alleys, avenues, and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires, and electrical equipment for the distribution of electricity for heat, light and power purposes in said municipality.

The defendant is a corporation, incorporated in August, 1924, under the laws of Ohio, for the purpose, among others, of engaging in the business of operating power plants with the necessary appliances, equipment, etc., for furnishing and distributing electricity for pri-

vate and public consumption, and since 1922 has been furnishing electricity to such of the people of Norwalk as choose to become its customers.

In 1890 six men, of whom there is now but one resident survivor, formed a partnership under the name of the Norwalk Incandescent Light Company to furnish electricity in the City of Norwalk for commercial purposes. Thereafter, upon application of the partnership therefor, the City of Norwalk, by ordinance passed October 7, 1890, granted to it, its successors and assigns for the term of twenty years, "a right of way through, in and upon the streets, sidewalks and alleys and grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron, or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city."

That ordinance contains certain restrictive conditions as to the height and location of the poles, and provides that "this grant of way is not exclusive." It contained no provision or condition as to how or in what manner the grantee should indicate its acceptance thereof, but the necessary equipment was installed by the partnership, and it thereafter conducted its business of furnishing and distributing electricity in Norwalk until the incorporation in March, 1891, of The Incandescent Light & Power Company of Norwalk, Ohio, for the purpose of "furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, * * * electric * * * power and * * * electricity for heating, for profit." In our judgment this was in law an acceptance thereof, and a formal written acceptance under these circumstances was unnecessary.

The Incandescent Light & Power Company of Norwalk, Ohio, was incorporated by the members of the partnership and one or two others, and upon its incorporation the partnership transferred to it all of the partnership property, and it proceeded to use the plant and equipment of the partnership to furnish electricity for lighting and commercial purposes in Norwalk. It continued so to do until February, 1893, when it filed in the Probate Court of Huron County a general deed of assignment for the benefit of creditors. By this deed it conveyed and assigned to the assignees named therein "all of its property of every nature and kind whatsoever." By a deed of the assignees, pursuant to an order of sale issued by the Court of Common Pleas, to which an appeal had been taken from the Probate Court, all of the property, including "all franchises, patronage and good will and rights of said business," of The Incandescent Light & Power Company, was conveyed and transferred on March 7, 1895, to George F. Jones and Mayme C. Foster, their heirs and assigns, who by deed dated May 20, 1895, by similar description, conveyed the property so acquired by them to The Northern Electric Company, "its successors, heirs and assigns." Thereafter, on May 8, 1900, the grantee corporation conveyed this property by like description to The Norwalk Gas & Electric Company, its successors and assigns. On July 16, 1895, the City of Norwalk entered into a contract with The Northern Electric Company for lighting the streets, alleys, etc., of the city for a period of ten years from September 1, 1895, which contract, by consent of the city, was assigned to The Northern Gas & Electric Company, and by the latter company, with consent of the city, assigned to The Cleve-

land Southwestern Traction Company; and on April 13, 1905, a second contract for street lighting for a period of ten years from September 1, 1905, was entered into by the city with The Cleveland Southwestern Traction Company.

The Norwalk Gas & Electric Company owned and operated the property and business until February 14, 1903, when it conveyed and transferred all of its property, franchise rights, and privileges to The Cleveland Southwestern Traction Company, its successors and assigns, by which company the property so described was conveyed and transferred to The Cleveland, Southwestern & Columbus Railway Company, which in turn, on March 1, 1924, conveyed and transferred it to The Cleveland Southwestern Railway & Light Company. On December 31, 1924, the last above named company, with the consent of the Public Utilities Commission of Ohio, transferred by bill of sale to one Victor Emanuel, by specific description, certain tangible personal property in Norwalk and "all distributing power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines on poles of the grantor, approximately 5.2 miles of lines on poles of others than the grantor, and approximately 4.3 miles of lines on poles owned jointly by the grantor and others, together with all right, title and interest of the grantor in and to the poles so occupied jointly."

On May 22, 1925, Victor Emanuel executed to the defendant, The Ohio Electric Power Company, a bill of sale for the above property in the identical language and

form of the conveyance to him from The Cleveland Southwestern Railway & Light Company. Also on December 31, 1924, The Cleveland Southwestern Railway & Light Company conveyed to said Emanuel "all such right and title as it has or ought to have in the following described premises"—describing certain rights of way and other personal property—and "all right, title and interest of the grantor in and to any rights of way for a pole line, pole line rights, pole lines, poles and any licenses, franchises, easements or grants for said purposes possessed or enjoyed by the grantor in the City of Norwalk, Ohio, and/or used in connection with the distribution of power, light and heat by the grantor in said city."

On May 22, 1925, Victor Emanuel, in consideration of $10 and other good and valuable considerations, sold, assigned, and quit-claimed to The Ohio Electric Power Company, its successors and assigns, certain specifically described property, and all contracts, franchises, grants, rights and privileges in the City of Norwalk acquired from The Cleveland Southwestern Railway & Light Company.

The relator contends that the defendant has no right to occupy the streets, alleys, and public places in the City of Norwalk with its poles, wires, etc., for the distribution of electricity therein, for the reason that the franchise granted by the municipality to the partnership, the Norwalk Incandescent Light Company, expired by limitation on October 7, 1910, and, the city not having thereafter consented to such use and occupation of its streets and other public places, the rights and privileges, so granted, thereupon ceased. The defendant claims,

first, that by legislative enactment passed January 26, 1887, and operative until April 21, 1896, when it was materially changed by amendments, its predecessors in the right to occupy the streets and public ways and places of Norwalk obtained such privilege and authority directly from the state, and that, as the successor to them by conveyance and assignment, it now possesses the rights and privileges so acquired; and, second, that the City of Norwalk, having permitted defendant and its predecessors in title to continue to so occupy its streets and public places and furnish commercial and private lighting in the municipality, is now estopped to deny the right of respondent to so conduct its business in Norwalk and to occupy the streets and public places thereof for such purposes.

Chapter 2, Subdivision 2, Division 2, Title IX of Part II of the General Code, relates to telegraph and telephone companies, and Section 9170 thereof, formerly Section 3454, Revised Statutes, provides that "A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof."

Section 3471, Revised Statutes, now Section 9191, General Code, made the provisions of this chapter applicable also to telephone companies.

Section 3471a, Revised Statutes, now Sections 9192, 9193 and 9194, General Code, as originally enacted January 26, 1887, 84 Ohio Laws 7, provided: "The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the

purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

This statute continued in force until April 21, 1896, when it was amended, 92 Ohio Laws 204, and as amended provided that "every such company shall have the same powers, except those given by said Section Three Thousand Four Hundred and Sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies," and that, "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality."

Section 3461, Revised Statutes, now Sections 9178 and 9179, General Code, relates to appropriation proceedings by telegraph companies, and by enactment of Section 3471a, Revised Statutes (Section 9192, General Code), became applicable to electric light and power companies. This section (Section 3461, Revised Statutes) provides in substance that the "mode of use" by any such company of the streets, alleys, etc., of any city or village, shall be such as shall be agreed upon by the municipal authorities thereof and the company, and, if they are unable to agree, the Probate Court in proceedings brought therein shall direct in what mode such line shall be constructed along such streets, alleys, etc. It is

apparent, therefore, that on October 7, 1890, when the ordinance was passed by the City of Norwalk granting to the partnership, the Norwalk Incandescent Light Company, its successors and assigns, the right to occupy the streets and public places of the city for the purposes therein stated, and thereafter, until April 21, 1896, when Section 3471a was amended (92 Ohio Laws, 204), neither a partnership nor any other person or company engaged in a like business was privileged to occupy the streets, alleys, etc., of any municipality in Ohio without either an agreement with the municipality or an order of the Probate Court directing the mode of such occupancy. It seems to us that neither a partnership nor an individual was contemplated by or designated in these statutory provisions. Their context seems clearly to indicate that the privileges thereby granted by the state applied only to incorporated companies. If this conclusion is correct, then not only the right to use, but the mode of use, could have been acquired by the partnership not otherwise than with the consent of the municipality expressed in an ordinance conferring those privileges. This the City of Norwalk did by the ordinance of October 7, 1890, limiting therein the right to use and the mode of use to twenty years from that date. The partnership, therefore, and its successive assignees, acquired the right to occupy the streets, alleys, etc., of Norwalk from the city and not from the state. Surely an electric light and power company upon which the state has conferred certain rights, conditional upon compliance with the legislative enactments creating them, may not as an assignee of a partnership or an individual acquire the rights so granted in derogation of the authority conferring them.

Any of the corporate assignees of the partnership could at any time have sought to agree with the municipal authorities as to the mode of use of the streets, alleys, etc., of the city in the exercise of their corporate functions and authority; and, if agreement between them was not possible, might have instituted proceedings in the Probate Court of Huron County to effect this purpose. The Northern Electric Company which last occupied the streets, etc., of Norwalk, prior to April 21, 1896, when Section 3471a, Revised Statutes, was amended, might have so proceeded at the expiration of the time fixed in the ordinance. Not having done so, and having relied solely upon the ordinance, with its restrictive terms and conditions, until the time within which the proceedings authorized by Section 3461, Revised Statutes, might have been invoked had elapsed, we are of the opinion that the respondent cannot now claim to be possessed of any greater rights than the ordinance gave. If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction.

State, ex rel., vs. Central Union Telephone Co., 11 C. C. 55, 5 C. D. 311.

The views we have here expressed and the conclusion at which we have arrived are not in conflict with the decision of the United States Supreme Court in *Ohio Public Service Co. vs. Ohio ex rel. Fritz*, 274 U. S. 12, 47 S. Ct. 480, 71 L. Ed. 898, for the reason that the franchise there involved was for an unlimited time. Being of the opinion also that the doctrine of estoppel has no application to the facts here presented, we conclude that the prayer of the relator should be granted.

Judgment accordingly.

Richards and Williams, JJ., concur.

2. Ohio Electric Power Co. vs. The State, ex rel. Martin, 121 O. S. 235

Municipal corporations—Twenty-year electric light franchise granted in 1890 (84 O. L. 7)*—Perpetual right to occupy streets not acquired from state, when—Nor by acquiescence or non-action of public officials or through estoppel.*

(No. 21302—Decided June 12, 1929.)

Error to the Court of Appeals of Huron County.

Messrs. Fauver & Fauver, and Mr. W. R. Pruner, for plaintiff in error.

Mr. Edgar G. Martin, Mr. G. Ray Craig, and Mr. Charles Suhr, city solicitor, for defendant in error.

By the Court: This is an action in *quo warranto*, originating in the Court of Appeals of Huron County, wherein is challenged the right of the defendant, the Ohio Electric Power Company, to maintain its poles,

wires, and electrical equipment in the streets, alleys, and public places in the City of Norwalk for the purpose of distributing and supplying electric current for commercial and private lighting, and plaintiff prays an order ousting the defendant therefrom. The Court of Appeals on hearing found for the plaintiff and ordered a decree of ouster as prayed for in the petition. Thereupon a petition in error was filed in this court.

The rights of the respective parties may readily be ascertained from a consideration of the facts disclosed by the record. The defendant, the Ohio Electric Power Company, became the owner of the property concerned, and of certain rights, privileges, and franchises, by successive grants from the Northern Electric Company, a corporation formed April 30, 1895. Shortly after its incorporation, to-wit, May 20, 1895, the Northern Electric Company procured a transfer to itself of the property, including all rights and franchises, theretofore belonging to the Incandescent Light & Power Company, a corporation organized March 7, 1891, and had acquired a 20-year franchise, which in 1890 had been granted to the Norwalk Incandescent Light Company, a partnership. The grant by the municipality to the partnership, which thereafter incorporated and became the Incandescent Light & Power Company, was for a stipulated and expressly limited term of 20 years, and granted a right of way upon the streets, alleys, and public grounds of said city for the purpose of therein erecting and maintaining necessary poles and wires to provide and successfully operate a system of incandescent lighting. No written acceptance was provided for, nor shown in the record, but it does appear that the ordinance was enacted upon

the application of the partnership, members of which attended the meeting of council and personally accepted the grant, and thereupon the grantees entered upon, and thereafter the company which took over the property of the partnership continued to operate, the plant and lines constituting the only lighting system then existing in the City of Norwalk. Said company was incorporated in March, 1891, its purpose being the furnishing to the citizens of Norwalk and vicinity electric current for lighting, power and heating. Later, through an assignee for creditors, and by order of court, all the property of said company, including "all franchises, patronage, good will and rights of said business," were sold and transferred to certain individuals named, who, in May, 1895, by conveyance of similar purport and description, transferred the same to the Northern Electric Company. By like description the same property was on May 8, 1900, conveyed to the Norwalk Gas & Electric Company, which had been organized and incorporated under the laws of Ohio April 17, 1900.

Thereupon the council of the City of Norwalk consented to an assignment of a 10-year contract for street lighting to the last named company, which contract had been entered into by the city and the Northern Electric Company in July, 1895. By a similar description said property was transferred to the Cleveland & Southern Traction Company in February, 1903. In April, 1905, the latter company entered into a contract with the City of Norwalk for street lighting in anticipation of the expiration of the former contract, no reference being made therein to commercial lighting; but the contract did provide for the erection and maintenance of poles, etc., un-

der the "restrictions and limitations imposed by said city," and contained the express provision that "nothing herein contained shall permit said use or occupation of said streets, alleys, and other public places after the expiration of this contract, to-wit, August 31, 1915." That contract further provided as follows: "The said contractor, at the expiration of this contract, shall, upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after 30 days' notice from said city, the same may be done by said city or its agents, and said contractor shall pay to said city all costs and expenses thereby incurred."

It is to be observed that no franchise was given for electric light or power purposes, or grant of any character made by the council of the City of Norwalk, subsequent to the 20-year franchise, and that franchise by its express terms expired in 1910, and no contract of any kind or character relative to the furnishing and distribution of electric current, except street lighting contracts above referred to, was entered into by and between the city and either of said companies. The defendant in this action acquired whatever property and rights it has, which are involved herein, by successive grants from the Cleveland & Southern Traction Company.

This record discloses that the City of Norwalk erected a municipal plant in 1915, and constructed, and has since maintained and operated, a complete system, whereby it supplies current for all its street lighting and

also meets the demand for most of the current consumed for private and commercial use in the city.

Under the facts presented by the record the claim of the defendant that by reason of the occupancy of the streets of the City of Norwalk its predecessor obtained a perpetual right to occupy said streets, to which right this defendant has succeeded, cannot be sustained. Under the law as it stood in 1890, when such 20-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself. Authority was conferred only upon incorporated companies designated by statute to so occupy the streets of a municipality, and then only by conforming to the method of procedure prescribed by statute. Concededly no franchise was ever granted, and no agreement with reference to the use and occupancy of the streets ever entered into, except as hereinbefore stated, and no application was made to or action taken by the Probate Court under the statute.

The cases dealing with unlimited franchise grants have no application here. The companies which successively acquired the property and rights of the grantee of the 20-year franchise necessarily accepted the burdens as well as the benefits of that franchise. They could not take the grant free from the limitations expressly imposed. That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed.

Mere acquiescence in the continued unauthorized occupancy of the streets, or non-action on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding.

Judgment affirmed.

Marshall, C. J., Robinson, Jones, Matthias, Day and Allen, JJ., concur.

Kincaid J., not participating.

SUPREME COURT OF THE UNITED STATES.

No. 290.—October Term, 1933.

Chase National Bank, Petitioner,
vs.
The City of Norwalk, Ohio.

On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 5, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

This case is here on certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, 290 U. S. —. Whether the injunction granted in this cause by the federal court for northern Ohio stays a judgment of ouster rendered by the Court of Appeals of the State in violation of Judicial Code § 265 is the main question requiring decision.[1]

In May, 1925, The Ohio Electric Power Company acquired the electric light and heating system then serving a part of the residents of the City of Norwalk, Ohio; and by a duly recorded mortgage deed of trust, transferred the property to a trustee to secure an issue of bonds. In March, 1926, the City Council passed a resolution in terms requiring the Power Company to remove from the streets, alleys and other public places within 30 days, its poles, wires and other electric equipment. These had been erected and were being maintained pursuant to an ordinance of the City, dated October 7, 1890. The City claimed that the Power Company had no right so to occupy the streets, alleys and public places, because the franchise granted by the ordinance was for a limited term and that term had expired without extension or renewal. The Power Company refused to comply with the City's demand, claiming that it had, under legislation of the State, acquired a perpetual franchise.

[1]Sec. 265. "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In May, 1926, the State brought, in the Court of Appeals of Ohio, at the relation of the prosecuting attorney for Huron County, an action in *quo warranto* against the Power Company to oust it from such use of the streets, alleys and public places. That court, holding that the franchise granted had expired, entered a judgment of ouster, *State ex rel. Martin* v. *Ohio Electric Power Co.*, 35 Ohio App. 481; and the judgment was affirmed by the Supreme Court of the State. *Ohio Electric Power Co.* v. *State ex rel. Martin*, 121 Ohio St. 235. The action had been instituted at the request, and had been prosecuted with the aid, of the City; but it was not a party thereto. The mortgage given by the Power Company and the bonds thereby secured were then (and still are) outstanding. But the State did not make the trustee a party respondent; and the trustee did not intervene, or seek to intervene, in the action. Neither the State nor the Power Company made mention of the existence of the mortgage either in its pleadings or otherwise. Whether the State, the relator, or the City knew of the mortgage, and whether the trustee knew of the action in *quo warranto*, does not appear.

Before any step had been taken by the State to enforce the judgment of ouster, the then trustee under the mortgage deed of trust, a citizen and resident of New York, brought this suit in the federal district court for northern Ohio. The Chase National Bank, likewise a citizen and resident of New York, has since been substituted as trustee and plaintiff. The City of Norwalk alone was made defendant. The bill set forth in addition to the facts stated above, that the plaintiff as such trustee is entitled to the continued use of the poles, wires and electrical equipment by the Power Company; that the judgment of ouster has not yet been executed; that the Power Company is still serving the Norwalk public; that the City is threatening to destroy, or forcibly remove, the poles, wires and equipment from the streets, alleys, and public places and to prevent the operation of the system or to seek to have enforced the judgment of ouster; and that such acts would result in irreparable injury to the plaintiff.

The District Court held that the plaintiff has as mortgagee a good and valid lien upon the poles, wires and electrical equipment, and the rights and franchises to use the streets, alleys and public places therefor; that "for the purpose of protecting, preserving

and enforcing the lien of the mortgage" the Power Company "is and was at the time of the filing of the bill of complaint herein the owner"; that these rights were granted "in perpetuity as against any right or power of the City of Norwalk with reference thereto . . ."; and that the "franchises, rights and physical properties will be destroyed and rendered worthless" unless a permanent injunction issues. The decree enjoined the City, its officers, agents and employees, "and all persons whomsoever to whom notice of this order shall come," from destroying, or interfering with the continued operation by the Power Company of, the plant and distribution system; "from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, . . . of the judgment of ouster"; and "from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster." The injunction was granted to continue only as long as the plaintiff or its successor, or holders of bonds under the mortgage, should have any interest in or lien upon the properties and franchises of the Power Company in the City of Norwalk.

The Circuit Court of Appeals did not pass upon the question whether the plaintiff has, as mortgagee, an interest in or lien upon the alleged property and rights; nor upon the question whether the Power Company retains for the protection of the mortgagee, an existing right to use the streets, alleys and public places as claimed; nor specifically upon the question whether the franchises granted had expired. It held, one judge dissenting, that, although the District Court had jurisdiction of the parties and of the subject matter, that court was not justified in granting an injunction; and it reversed the decree with directions to dismiss the bill, 63 F. (2d) 911, for the following reasons:

(a) That the proceedings in the District Court came within the inhibitions of Judicial Code Sec. 265 in that the effect of the decree was to stay the *quo warranto* proceeding in the state courts.

(b) That the case does not fall within the exceptions which permit a federal court to interfere with the judgment of a state court, because there was no showing that the judgment in the action in *quo warranto* was void for lack of jurisdiction, or was based upon fraud or upon such accident or mistake as made its enforcement unconscionable.

(c) That because the plaintiff has not shown that it lacked knowledge of the action in *quo warranto*, or that it could not have intervened therein as mortgagee, and have asserted therein the claim which it presents now as the basis of the relief sought, it has failed to make the necessary showing of diligence.

There was error in the decree entered by the District Court; but the Circuit Court of Appeals was not justified in ordering that the bill be dismissed.

First. Independently of the prohibition of Judicial Code, § 265, the decree entered by the District Court was clearly erroneous in so far as it enjoined "all persons to whom notice of the order of injunction should come from taking any steps or action of any kind to cause the enforcement of the ouster in the state court." The City alone was named as defendant. No person other than the City was served with process. None came otherwise before the court. The prayer of the bill sought relief solely against the City and "its officers, officials, agents, employees and representatives."[2] It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies. See *In re Lennon*, 166 U. S. 548. But by extending the injunction to "all persons to whom notice of the injunction should come", the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law.[3] See *Alemite Mfg. Co.* v. *Staff*, 42 F.

[2]The prayer is that "the City of Norwalk, and the officers, officials, agents, employees and representatives of said defendant" be enjoined "from in any manner interfering with or interrupting the continued operation of the plant and electrical distribution system of the Ohio Electric Power Company, in the streets, alleys and other public places of the City of Norwalk and from taking any steps or doing any act to dismantle, wreck or remove any part of said system . . ." and "from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, or any of his deputies, or by any other officer of any of the courts in the State of Ohio, of the judgment of ouster. . . ." (The latter prohibition to apply also to the attorneys of the City.)

[3]Harvey v. Bettis, 35 F. (2d) 349; Donaldson v. Roksament Stone Co., 178 Fed. 103; Bliss v. Atlantic Handle Co., 212 Fed. 190; Omeliah v. American Cap Front Co., 195 Fed. 539, 540. Compare Toah v. West Kentucky Coal Co., 252 Fed. 44, 48.

(2d) 832. Under the clause inserted in the decree, officials of the State of Ohio might be proceeded against for contempt, if they should apply to the state court to enforce its judgment, although acting solely in the performance of their official duty. To subject them to such peril violates established principles of equity jurisdiction and procedure. *Scott* v. *Donald*, 165 U. S. 107, 117; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 234.[4] Those principles require that the clause be limited to confederates or associates of the defendant.

Second. On the other hand, the decree of the Circuit Court of Appeals was clearly erroneous in so far as it refused to enjoin the "city and its agents from forcibly removing the wires and poles without state warrant." The trustee claimed that it had a valid mortgage lien upon the poles, wires and electrical equipment, and upon the right and franchise in perpetuity to use them on the streets, alleys and public places; and the bill alleged that removal by the City of the poles and wires would result in irreparable injury to the trustee. Neither the trustee nor the City had been a party, or privy, to the litigation in the state courts. These courts did not purport to pass upon the validity of the trustee's claim; and in no state court was that claim in litigation. However broad the scope of the prohibition prescribed by Judicial Code § 265, it could not preclude the federal court from protecting the trustee's alleged property from wanton destruction by one not a party or privy to the judgment of ouster.

The contention is that in essence this "is a suit by a mortgagee to obtain a readjudication of the law and facts adjudicated by a state court of competent jurisdiction in a proceeding to which the mortgagor was a party"; and that, since the controlling question is one of the construction and application of statutes of Ohio, a federal court would, in any event, follow the decision of the highest court of the State. It is true that, in the absence of special circumstances, federal courts consider themselves bound by the construction theretofore given by the highest court of a State to its statutes. But, under well settled principles of jurisdiction, governing all courts, a decree against a mortgagor with respect to property does not bind a mortgagee whose interest was acquired before the commencement of the suit, unless he was made a party

[4] Compare United States Playing Card Co. v. Spalding, 92 Fed. 368, 369.

to the proceedings.' *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 122.[5] For in every case where a mortgage was given before the litigation against the mortgagor was instituted, the mortgagee is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him. Obviously, the facts and considerations affecting the trustee's rights may be different from those presented to the state court on behalf of the Power Company. Because there is diversity of citizenship, the trustee under the mortgage is entitled to have the adjudication of his alleged rights made in the federal court. Compare *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101. As a decree enjoining the City "from removing the wires and poles without state warrant" would not interfere with the proceedings in the state court, that part of the injunction was not within the prohibition of Judicial Code § 265. *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. 296, 300, 317.

Third. The contention that the decree violates Judicial Code § 265, is rested mainly upon the clause which enjoins the City, its officers and attorneys "from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officer of any of the courts in the State of Ohio of the judgment of ouster" and "from applying to any of the courts of the State of Ohio for any writ or process of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster."

To enjoin the City from taking steps to enforce the judgment of ouster obviously does not stay that judgment. The City was not, and could not have been a party to the action in *quo warranto*.[6] The City's argument is that the decree can have no effect unless it acts directly upon the Court of Appeals of Huron County itself, and upon the State of Ohio, which was the moving party in the *quo warranto* proceeding, and that hence, this action is an at-

[5] Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Old Colony Trust Co. v. Tacoma, 219 Fed. 775, 776; Illinois Trust & Savings Bank v. Des Moines, 224 Fed. 620, 624; Williamson v. Clay Center, 237 Fed. 329, 335. Compare Dull v. Blackman, 169 U. S. 243; Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111; Postal Telegraph Co. v. Newport, 247 U. S. 464, 476; Doctor Jackpot Mining Co. v. Marsh, 216 Fed. 261.

[6] The City states that it was not, and could not have been made, a party to the *quo warranto* proceedings; that the fact that *quo warranto* proceedings are brought by the State in its sovereign capacity is not a mere matter of

tempt to do so; that "the incidental effect of the decree upon the possible unauthorized action of the city officials is too negligible to be given consideration in determining its character"; and that the real purpose for which the decree was sought is to stay the proceeding in the state court. It may be assumed that in seeking an injunction from the federal court, the trustee's purpose—its hope—was to induce the officials of the State of Ohio to refrain from enforcing the judgment of ouster until adjudication of the trustee's rights should have been had in the federal court. That purpose or hope is not of legal significance in this connection. Full control of the ouster proceeding rests with the law officers of the State, subject to the control of the state court. See *Thompson* v. *Watson*, 48 Ohio State 552. The injunction, when limited as we hold it must be, is directed only to the City, its attorneys, agents and confederates. It prohibits them from attempting to induce the State to enforce the judgment of ouster. So limited, the decree will leave the State and the relator free to act; and the injunction will not stay the operation of the judgment.

Fourth. The contention is also made that the Circuit Court of Appeals properly ordered the bill dismissed because the trustee failed to allege, or prove, that it did not have knowledge of the proceeding in the state court or that it could not have intervened therein, as mortgagee, and asserted there the claims that it now makes as the basis of the relief sought. Where equitable relief is sought on the ground that a judgment entered upon proper service in a court of competent jurisdiction was obtained through fraud or mistake, or is being used fraudulently, such a showing of diligence is ordinarily required. *Crim* v. *Handley*, 94 U. S. 652; *Brown* v. *Buena Vista*, 95 U. S. 157; *Knox County* v. *Harshman*, 133 U. S. 152; *Marshall* v. *Holmes*, 141 U. S. 589.[1] Compare *Wells, Fargo & Co.* v. *Taylor*,

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form, but is of the essence of the proceeding; and that it is public not personal in nature, regardless of the person who furnishes the information upon which the action is based. In support of this proposition the City cited State v. Maccabees, 109 Ohio State 454; State v. Conservancy District, 100 Ohio State 483; Hardin-Wyandot Co. v. Upper Sandusky, 93 Ohio State 428; Thompson v. Watson, 48 Ohio State 552; State v. Craig, 21 Ohio C. C. 175.

[1] Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Old Colony Trust Co. v. Tacoma, 219 Fed. 775; Illinois Trust Co. v. Des Moines, 224 Fed. 820; Williamson v. Clay Center, 237 Fed. 329; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811; Seay v. Hawkins, 17 F. (2d) 710; but compare Denton v. Baker, 93 Fed. 46.

254 U. S. 175. But here the injunction is sought on the ground that the judgment is inoperative as against the plaintiff because it was neither party nor privy thereto. Compare *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100.[8] The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. Whether under the Ohio practice it would have been possible for the trustee to intervene, we have no occasion to determine.[9] Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

The decree of the Circuit Court of Appeals is reversed. As it did not pass upon the merits of the trustee's claim, the cause is remanded to that court for further proceeding in conformity to this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[8] Also compare National Surety Company v. State Bank, 120 Fed. 593.

[9] In Northern Ohio Traction & Light Co. et al. v. State of Ohio, *ex rel.* Pontius, Prosecuting Attorney, 245 U. S. 574, a proceeding in *quo warranto*, in which the Traction Company alone was named as defendant, it appears from the record in this court, that the Cleveland Trust Company, trustee under a mortgage, moved in the Supreme Court of Ohio for leave to be made a party and to file an answer; that consent thereto was given; that thereafter motion was allowed; and that the answer was filed and replied to.